Supreme Court, U.S.
FILED

No. 93-1089

NOV 24 1993
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In The

Supreme Court Of The United States

October Term, 1993

CHARLES KERNAN, JETON LEE ALLEN, and PAUL STEWART,

Petitioners,

vs.

IRWIN TANAKA
Administrative Director of the Courts
State of Hawaii,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state-created statutory scheme that affords a driver whose license has been administratively revoked the opportunity to raise constitutional defenses at a post-administrative hearing judicial review, but which does not provide for the adjudication of such issues within a meaningful time, triggers the Due Process clause of the United States Constitution?

2. Whether a state scheme that provides for all stages of an administrative license revocation procedure, including judicial review, to be conducted in a non-adversarial setting and eliminates the representation of the state's interests by a third-party to the proceedings, violates the fundamental principles of the Due Process clause of the United States Constitution?

LIST OF PARTIES AFFECTED

In addition to the parties listed in the caption, a number of other parties are affected by this case. There are currently a number of appeals before the Hawaii State Supreme Court the are directed, in part at the question presented in the case at bar.

At the request of Petitioners' attorneys, the Hawaii State Supreme Court issued Stays of Appeal, pending the outcome of this Petition, in twenty-six of these cases.

There may be additional cases before the Hawaii State supreme Court that are affected by this case, but the identities of the appellants in those cases are not known to Petitioners. The identities of the parties in any such cases are within the purview of Respondent, or his successor, who would be the appellee in each of them.

There is also an appeal underway in the United States Court of Appeals for the Ninth Circuit that addresses the issue at hand. That appeal is from a final judgment of the United States District Court for the District of Hawaii, granting Defendants' Motion to Dismiss the complaint, in a class action brought by two of the Petitioners herein (Jeton Lee Allen and Charles Kernan), and others.

The Respondent herein is also a defendant in that case, which is a 42 U.S.C. 1983 action challenging the constitutionality of Hawaii's administrative driver's license revocation statues.

Oral argument for that appeal was heard by the Ninth Circuit Court on November 1, 1991, at Honolulu, Hawaii.

To date, no judgment on the appeal has been rendered by that court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

LIST OF PARTIES AFFECTED ii

TABLE OF AUTHORITIES vi

LIST OF APPENDICES FOR PETITION FOR CERTIORARI vii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED . . 2

STATUTES INVOLVED 2

STATEMENT OF THE CASES 9
Hawaii's Administrative Driver's License Revocation Procedure . . 9
As To Petitioner Kernan 11
As To Petitioner Allen 14
As To Petitioner Stewart 15
Consolidation of Petitioner's Cases By The Hawaii Supreme Court . . 17
Decision Of The Hawaii Supreme Court 20

REASONS FOR GRANTING THE WRIT 23
I. DUE PROCESS PROHIBITS THE ADMINISTRATIVE TAKING OF A CONSTITUTIONALLY PROTECTED INTEREST WITHOUT PROVIDING FOR THE TIMELY ADJUDICATION OF CONSTITUTIONAL CLAIMS. . 24

II. WHERE THE STATE IS A PARTY TO A DISPUTE, DUE PROCESS REQUIRES ADJUDICATION BY A FAIR AND IMPARTIAL JUDGE WHO WILL DO HIS UTMOST TO BALANCE THE SCALES BETWEEN CONTENDING PARTIES 33

CONCLUSION 39

TABLE OF AUTHORITIES

CASES — Page

Dixon v. Love, U.S. 105 (1976) 24, 25

Gibson v. Berryhill,
411 U.S. 564, 577 (1973) 28

Gonzales v. Franklin,
595 F.Supp. 302 (S.D. Ohio 1984) 29

HOH Corp. v. Motor Vehicle Industry Licensing Board,
69 Haw. 135, 736 P.2d 1271 (1987) 26

Illinois v. Batchelder,
462 U.S. 1112 (1983) 24, 26

In Re Murchison, 349 U.S. 133, 136
(1955) 33, 38

Mackey v. Montrym, 443 U.S. 1 (1978) 24, 31

Mathews v. Eldridge, 424 U.S. 319 (1976) 20

Middlesex County Ethics Committee v. Garden State Bar Association,
457 U.S. 423, 437 (1982) 28

Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986) 18

Sifagoloa v. Board of Trustees of the Employee's Retirement System of the State of Hawaii,
74 Haw. 181, 193, 840 P.2d 367,
372 (1992) 22

Thomas v. Fiedler,
700 F.Supp. 1527 (E.D. Wisc. 1988) 28, 29

Tumey v. Ohio, 273 U.S. 510 (1927) 19

Withrow v. Larkin, 421 U.S. 35, 58 (1975) 38

UNITED STATES CONSTITUTION Page

Fourteenth Amendment 2, 33, 39

HAWAII REVISED STATUTES Page

Section 286 et seq. 34

Section 286-252 (Supp. 1992) 2

Section 286-258 (Supp. 1992) 3

Section 286-259 (Supp. 1992) 4, 34

Section 286-259(d)(2) 35

Section 286-260 (Supp. 1992) 6, 30, 35

Section 286-261 (Supp. 1992) 8

Section 286-264 10

Section 291-4 11

LIST OF APPENDICES FOR PETITION FOR CERTIORARI

A (Opinion of Hawaii Supreme Court No. 1508, No. 1506, No. 1505 re: Kernan, Stewart, and Allen w\out Head notes - Title page, then page 1)

B Judicial Review decision re: Kernan

C Judicial Review decision re: Allen

D Judicial Review decision re: Stewart

E Opening Brief re: Appeal to Hawaii Supreme Court/Kernan and Stewart

F Opening Brief re: Appeal to Hawaii Supreme Court/Allen

G Judgment on Appeal, Hawaii Supreme Court (August 26, 1993)

No. _____

In The

Supreme Court Of The United States

October Term, 1993

CHARLES KERNAN, JETON LEE ALLEN, and PAUL STEWART,

Petitioners,

vs.

IRWIN TANAKA
Administrative Director of the Courts
State of Hawaii,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners Charles Kernan, Jeton Lee Allen, and Paul Stewart, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Hawaii in these cases.

OPINION BELOW

The consolidated opinion of the Supreme Court of the State of Hawaii is

attached to the Petition as Appendix A, and is reported in 75 Haw. 1 and 856P.2d 1207.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was entered on August 26, 1993 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> [N] or shall any state deprive any person of life, liberty, or property, without due process of law * * *.

STATUTES INVOLVED

Hawaii Revised Statutes, Section 286-252 (Supp. 1992) provides in pertinent part:

> As used in this part, the notice

of administrative revocation:

(1) Establishes that the arrestee's driving privileges in this State shall be terminated thirty days after the date of the arrest of such later date as is established by the director under section 286-259 if the director administratively revokes the arrestee's license;

(3) Serves as a temporary permit to drive as provided in section 286-255.

Hawaii Revised Statutes, Section 286-258 (Supp. 1992) provides in pertinent part:

(a) the director shall automatically review the issuance of a notice of administration revocation, and a

> written decision administratively revoking the license or rescinding the notice of administrative revocation shall be mailed to the arrestee no later than eight days after the date the notice was issued.

Hawaii Revised Statutes, Section 286-259 (Supp. 1992) provides in pertinent part:

> (a) If the director administratively revokes the arrestee's license after administrative review, the arrestee may request an administrative hearing to review the decision within five days of the date the administrative review decision is mailed. The hearing shall be scheduled to commence no later than twenty-five days from the date the

notice of administrative revocation was issued. The director may continue the hearing on as provide in subsection (j).

****

(i) The director's decision shall be rendered in writing and mailed to the arrestee no later than five days after the hearing. If the decision is to reverse the administrative revocation, the director shall return the arrestee's license along with a certified statement that administrative revocation proceedings have been terminated. If the decision sustains the administrative revocation, the director shall mail to the arrestee a written

decision indicating the duration of the administrative revocation and any other conditions or restriction as may be imposed pursuant to section 286-261.

Hawaii Revised Statutes, Section 286-260 (Supp. 1992) provides:

(a) If the director sustains the administrative revocation after the administrative hearing, the arrestee may file a petition for administrative review within thirty days after the administrative hearing decision is mailed. The petition shall be filed with the clerk of the district court in the district in which the offense occurred and shall be accompanied by the required filing fee for civil actions. The filing of the

petition shall not operate as a stay of administrative revocation nor shall the court stay the administrative revocation pending the outcome of the judicial review. The petition shall be appropriately captioned. The petition shall state with specificity the grounds upon which the petitioner seeks reversal of the administrative revocation.

(b) The court shall schedule the judicial review as quickly as practicable, and the review shall be on the record of the administrative hearing without taking of additional testimony or evidence. If the petitioner fails to appear without just cause, the court shall affirm the administrative

revocation.

(c) The sole issues before the court shall be whether the director exceeded constitutional or statutory authority, erroneously interpreted the law. acted in an arbitrary or capricious manner, committed an abuse of discretion, or made a determination that was unsupported by the evidence in the record.

Hawaii Revised Statutes, Section 286-261 (Supp. 1992) provides in pertinent part:

. . . .

(b) The periods of administrative revocation which may be imposed under this part are as follows:

(1) Three months, if the arrestee's driving

record shows no prior alcohol enforcement contacts during the five years preceding the date of arrest;

(2) One year if the arrestee's driving record shows one prior alcohol enforcement contact during the five years preceding the date of arrest.

STATEMENT OF THE CASES

Hawaii's Administrative Driver's License Revocation Procedure

Hawaii's administrative driver's license revocation scheme consists of the following steps: 1) a driver arrested for Driving Under the Influence of Intoxicating Liquor ("DUI") is issued a Notice of Revocation and a thirty-day temporary driver's permit by the arresting

officer; 2) the director of the Administrative Driver's License Revocation Office ("ADLRO") automatically reviews the notice of revocation and, upon a finding that the driver was legally intoxicated, issues a written decision administratively revoking the driver's license, within eight days of the arrest; 3) within twenty-five days of the arrest, if requested by the arrestee, as administrative hearing is conducted; 4) if the decision of the director is sustained at that hearing, the driver may request a judicial review of the revocation by the district court (Appendix A, at A-1-9; and, 5) if the decision of the director is affirmed at the administrative hearing, the driver may request a limited permit, which is issued at the director's discretion, but not until an absolute thirty day revocation period has passed. Hawaii Revised Statutes ("HRS"), Section

286-264.

The revocation period for a first time offender is ninety (90) days. Appendix A, at F-36.

The judicial review of the revocation presents the driver with his first opportunity to raise constitutional claims. Appendix A, at A-40-42.

The administrative hearing, conducted by the ADLRO, and judicial review in the district court involves no third-parties; the state's interests are represented solely by hearing officers and, at judicial review, by district court judges. Appendix E, at E-63-65; Appendix F, at F-25-80. The ADLRO and the district courts are part of, and administrated by the state judiciary. Appendix F, at F-29-60.

As To Petitioner Kernan

Petitioner Kernan was arrested for DUI, in violation of Hawaii Revised Statute ("HRS"), Section 291-4 on August

9, 1991. Despite notification of "implied consent" to submit either a blood or breath sample for blood alcohol level testing, Petitioner Kernan refused to be tested. At that time, the arresting officer(s) issued Petitioner Kernan a Notice of License Revocation and a thirty-day temporary driving permit. Appendix A, at A-10-12.

The director of the ADLRO reviewed the issuance of the Notice of Administrative Revocation to Petitioner Kernan and revoked his license. Appendix A, at A-10-12. Petitioner kernan's license revocation was for a duration of one year, rather than the normal ninety days, due to his refusal to provide a breath or blood sample for blood alcohol content analysis. Appendix E, at E-5. Petitioner Kernan subsequently applied for, and was granted and administrative hearing to review the revocation of his

license by the director of the ADLRO. That hearing was held on August 30, 1991, and resulted in the affirmation of Petitioner Kernan's revocation. Appendix A, at A-10-12.

Upon notification of the results of his administrative hearing, Petitioner Kernan filed a petition for judicial review, challenging the constitutionality of the revocation process. The judicial review was held by the district court on November 18, 1991, and a decision, affirming Petitioner Kernan's revocation, was issued by the district court on December 20, 1991. Appendix C. The district court's decision was issued one-hundred and two (102) days after the expiration of Petitioner Kernan's thirty-day temporary permit.

Petitioner Kernan subsequently appealed that decision to the Supreme Court of the State of Hawaii ("Hawaii

Supreme Court"). Appendix A, at A-9-10.

As To Petitioner Allen

Petitioner Allen was arrested for DUI on August 13, 1991 and was issued a Notice of License Revocation and a thirty-day temporary driving permit. Appendix A, at A-12.

The director of the ADLRO reviewed the issuance of the Notice of License Revocation to Petitioner Allen and revoked his license. Appendix A, at A-12.

Petitioner Allen's driver's license was revoked for a period of ninety (90) days, commencing September 14, 1993. Appendix F, at F-5.

Petitioner Allen subsequently requested an administrative hearing to review the revocation of his license by the director of the ADLRO, which was held on September 20, 1991, and resulted in the affirmation of his license revocation. Appendix A, at A-12.

Petitioner Allen petitioned for judicial review of his license revocation, in part on constitutional grounds, and a hearing was held by the district court on December 2, 1991. On December 20, 1991, some ninety-eight (98) days after his temporary thirty-day permit had expired and eight (8) days after his revocation had run its course, the district court issued a decision affirming Petitioner Allen's revocation. Appendix D.

Petitioner Allen subsequently appealed that decision to the Hawaii Supreme Court. Appendix A, at A-9-10.

As To Petitioner Stewart

Petitioner Stewart was arrested for DUI on September 3, 1991 and was issued a Notice of License Revocation, but was not issued a thirty-day temporary driving permit because his license had been previously suspended. Appendix A, at A-13.

Petitioner Stewart's license was

revoked for one year upon review of the issuance of the Notice of Administrative Revocation by the director of the ADLRO. Appendix A, at A-13.

An administrative hearing, reviewing Petitioner Stewart's revocation, was scheduled for October 2, 1991, and resulted in the affirmation of his revocation. Appendix A, at A-13-14.

A subsequent judicial review, requested by Petitioner Stewart, was held by the district court on December 2, 1991, and resulted in the affirmation of his license revocation. Appendix A, at A-13-14. That decision was issued on December 20, 1991, seventy-five (75) days after Petitioner Stewart's temporary thirty-day permit would have run its course.

Petitioner Stewart subsequently appealed the district court's decision to the Hawaii Supreme Court. Appendix A, at A-9-10.

Consolidation of Petitioner's Cases By The Hawaii Supreme Court

The Hawaii Supreme Court consolidated Petitioners' appeals because they were based, in large part, on the same constitutional issues. Appendix A, at A-9-10. Germane to this case, Petitioners' appeals to the Hawaii Supreme Court were premised on the following two common challenges to the constitutionality of Hawaii's administrative driver's license revocation scheme:

That the constructs and application of Hawaii's administrative revocation procedure violate the Due Process Clause of the United State Constitution because -

1. No provision is made to afford a driver, whose license has been administratively revoked, a timely opportunity to have his constitutional claims decided (Appendix E, at E-48-52).

2. The prosecution and adjudication

of a driver's license revocation is undertaken, in its entirety, by the state judiciary (Appendix E, at E-65-80).

The thrust of Petitioner's appeal, with respect to the first issue, was predicated upon the due process requirement, espoused in *Ohio Civil Rights Commission v. Dayton Christian Schools,* 477 U.S. 619 (1986), that a defendant in a state proceeding must be afforded an adequate opportunity to raise constitutional claims and to have those claims decided in a timely fashion. Appendix E at E-58.

Petitioners did not claim that the opportunity to have thier constitutional claims adjudicated must precede the revocation of their licenses. But rather, that they were constitutionally entitled to have these heard within a meaningful time; before the expiration of the normal ninety day revocation period. Appendix E

at E-80-86.

The Petitioners' second challenge to the constitutionality of the administrative proceedings was founded on the underlying principle of due process, that a defendant in any state proceeding is entitled to a fair and unbiased hearing. *See Tumey v. Ohio,* 273 U.S. 510 (1927). Appendix E, at E-68-70.

Petitioners pointed to the inherent difficulties in meeting this fundamental constitutional requirement under the circumstances presented by Hawaii's administrative revocation proceedings. Under that scheme, an officer of the judiciary is expected to both represent the interests of the state and hold the balance between those interests and the interests of the accused. Appendix E, at E-68-70.

Petitioners charged that the appearance of justice was vitiated in all

stages of these proceedings, by the glaring absence of a third party, a prosecutor. Appendix E, at E-65-73.

Decision Of The Hawaii Supreme Court

The Hawaii Supreme Court affirmed the decision of the lower court, revoking Petitioners' driver's licenses. Appendix A.

In considering Petitioners' constitutional challenges, the court found that the administrative revocation proceedings did not "offend the principles" delineated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), holding that due process does not entitle a driver to a pre-deprivation adjudication of constitutional issues. Appendix A, at A-31-47.

The Hawaii Supreme Court did acknowledge the lack of any mechanism to ensure such a judicial review prior to the suspension of a driver's license, and

indeed, that such reviews normally occur after the expiration of the thirty-day temporary permit. However, it did not establish when, if ever a defendant is entitled to the adjudication of constitutional defenses. Appendix A, at A-21 et seq. The adjudicaition of these defenses within a meaningful time was not addressed, in spite of the fact that this was one of the major issues before the Court. Appendix E.

In fact, the court's opinion suggests that due process does not require any opportunity to litigate constitutional defenses; that "the interest in a driver's license is not so great that more than an administrative review and hearing are needed to comport with the requirements of due process." Appendix A, at A-46-47.

In addressing the effect upon the principles of due process and fairness caused by the fact that Hawaii's

revocation procedure is entirely within the purview of the state judiciary, the court found no impropriety in that arrangement. The court held that "The fact that the arrestee or witness may be questioned by the hearing officer should not suggest that he or she is a "prosecutor" any more than a judge's inquiry of a witness makes the judge a "prosecutor." Appendix A, at A-45-46.

The court concluded that the Petitioners had failed to make a showing that the hearing officers had a sufficient interest in the outcome to "overcome the 'presumption of honesty and integrity' that attaches by virtue of [their] office" Appendix A, at A-46 (citing: *Sifagoloa v. Board of Trustees of the Employee's Retirement System of the State of Hawaii*, 74 Haw. 181, 193, 840 P.2d 367, 372 (1992)).

The court confined its decision, with

respect to this issue, to the role of the ADLRO officers. Appendix A, at A-45-46. It did not address the full scope of the issue raised by Petitioners; that each stage of the revocation proceeding, the initial ADLRO revocation, the ADLRO hearing, and the district court's judicial review, is conducted without the benefit of a third-party prosecutor and creates an adversarial relationship between the hearing officer, or judge, and the accused, thereby violating the tenets of due process. Appendix E, at E-80-86.

Your Petitioners now seek a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS PROHIBITS THE ADMINISTRATIVE TAKING OF A CONSTITUTIONALLY PROTECTED INTEREST WITHOUT PROVIDING FOR THE TIMELY ADJUDICATION

OF CONSTITUTIONAL CLAIMS.

In reaching its decision that Hawaii's post-deprivation judicial reviews are adequate, the Hawaii Supreme Court erroneously relied on three U.S. Supreme Court decisions; *Illinois v. Batchelder*, 462 U.S. 1112 (1983); *Mackey v. Montrym*, 443 U.S. 1 (1978); and, *Dixon v. Love*, U.S. 105 (1976). Appendix A, at A-28-37. The constitutional due process right of a timely opportunity to raise constitutional defenses, at issue here, was not at issue in any of those cases.

Each of these cases dealt solely with the question of whether the provision for an evidentiary hearing, in connection with the respective respondent states' revocation procedures, comported with the requirements of due process.

In *Mackey*, the issue before this Court was whether an evidentiary hearing must take place before of after a driver's

license is initially revoked. *Mackey v. Montrym*, 443 U.S. 1 (1979). Though not at issue in that case, this Court did note that formal judicial review of license revocations in Massachusetts normally took place within twenty-nine (29) days of a license revocation - before the duration of a license revocation had run its course. *Id.* at 11-12.

Similarly, the sole issue in *Love* turned on whether a license could be revoked prior to any hearing; the availability of a forum in which a driver could have his constitutional defenses adjudicated was not addressed. *Dixon v. Love*, 431 U.S. 105 (1979).

Finally, the opportunity to raise constitutional defenses was not at issue in *Batchelder*, perhaps because a driver's predeprivation hearing was held in the Illinois Circuit Court; a court that was empowered to adjudicate the driver's

constitutional claims. *Illinois v. Batchelder*, 462 U.S. 1112 (1983).

The availability of Hawaii's predeprivation evidentiary hearings is not at issue. Such hearings take place prior to the deprivation of an arrestee's driving privileges, during the valid term of the temporary thirty day permit that is issued by the arresting officer. Appendix A, at A-23. Nor is there any expectancy, that a driver is entitled to raise constitutional defenses at the administrative hearing stage of the proceeding. In Hawaii, an administrative agency "lacks the power" to adjudicate constitutional claims. *HOH Corp. v. Motor Vehicle Industry Licensing Board*, 69 Haw. 135, 736 P.2d 1271 (1987); Appendix A, at A-41. The ADLRO hearing officer is limited to a determination of "the validity of basic facts that set the stage for the court to consider constitutionally

significant matters on review". Appendix A, at A-41-42.

The issue, is when must such a review take place?

The Hawaii Supreme Court determined that the opportunity to raise constitutional claims need not be afforded at the predeprivation stage of the proceedings. Appendix A, at A-41-42. It went on to hold that "the interest in a driver's license is not so great that more than an administrative review and hearing are needed to comport with the requirements of due process." Appendix A, at A-46.

The Hawaii Supreme Court's determination that federal due process does not require any opportunity to raise constitutional defenses directly controverts this Court's holdings.

In order to deprive an individual of a constitutionally protected interest, a

state proceeding must afford that person the opportunity to raise constitutional claims and have judgment rendered thereon by a competent state tribunal. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 437 (1982). More importantly, it must do so within a meaningful time. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

Although this court has not had occasion to apply these holdings to proceedings involving the deprivation of a driver's license, other federal courts have done so.

In Wisconsin, the federal district court struck down an administrative revocation scheme because there was no requisite for a prompt judicial review of an administrative revocation. *Thomas v. Fiedler*, 700 F.Supp. 1527 (E.D. Wisc. 1988). The Wisconsin legislature amended its law to require a judicial review

decision within sixty (60) days of a revocation. As a result, the issue was rendered moot in a subsequent appeal before the 7th Circuit Court of Appeals. *Thomas v. Fiedler*, 884 F.2d 990 (1989)

In a similar case, a federal district court issued a preliminary injunction because a driver, whose license had been suspended, was not afforded a timely opportunity to raise constitutional defenses. *Gonzales v. Franklin*, 595 F.Supp. 302 (S.D. Ohio 1984). The Ohio revocation scheme reviewed in *Gonzales*, provided for the adjudication of constitutional claims on appeal as does Hawaii's. *Id.* at 386

The thrust of these cases is not that judicial reviews must be provided in order to eliminate the risk of an erroneous deprivation, but rather, that the resolution of constitutional claims is timely if the risk of an erroneous

deprivation can be mitigated.

Hawaii's judicial reviews are not scheduled with the constitutional requisites of timeliness in mind. This is due to the ambiguity in the constructs of HRS, Section 286-260, which requires only that judicial review be held "as quickly as practicable." Moreover, the Hawaii Supreme Court's decision failed to acknowledge the due process rights that attach to the litigation of constitutional issues.

In practice, judicial reviews, and the ensuant decisions, do not take place until well after the revocation period has begun. In Petitioner Allen's case, the review decision was not rendered until eight (8) days after his ninety (90) day license revocation had run its course. Appendix F, at F-7-9. Had Petitioners Kernan and Stewart been faced with normal ninety (90) day revocations, their

respective review decisions would also have come at a meaningless time. As it turned out, both of the decisions in their cases were issued more than three months after the revocation of their licenses had begin to toll. Appendix E, at E-11, 15. As a result, the adjudication of Petitioners' constitutional claims was rendered meaningless by the passage of time.

The Hawaii Supreme Court's decision was largely predicated on its evaluation of the governmental interests at stake. It correlated Hawaii's interests with those enumerated by the *Mackey* Court. Appendix A, at A-42-45.

The only governmental interest expressed in *Mackey* was the immediate removal of a drunk driver from the road. This was due to public risk posed by a driver who might still be drunk and driving his car. *Mackey v. Montrym*, 443

U.S. at 17. Hawaii has no such interest. This is evidenced by the administrative process, which provides for the immediate issuance of a temporary thirty (30) day driver's permit at the time a driver is arrested for DUI. Appendix A at A-18-19.

Hence, Hawaii's interest in the urgency of removing a drunk driver from the road is overcome by its own administrative revocation procedure which puts him back on the road right after he is caught. As a result, the Hawaii Supreme Court also cited the fiscal and administrative burden that would ensue if judicial review were mandated in the predeprivation stages of a license revocation. Appendix A, at A-43. While this may be true, it is irrelevant to the issue of whether such reviews must be held within a meaningful time after the revocation period has begun; an issue the court did not come to terms with, in spite

of it having been presented by Petitioners.

In sum, the failure of the state legislature or the Hawaii Supreme Court to provide for the timely adjudication of constitutional claims, in a driver's license revocation action, is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II. WHERE THE STATE IS A PARTY TO A DISPUTE, DUE PROCESS REQUIRES ADJUDICATION BY A FAIR AND IMPARTIAL JUDGE WHO WILL DO HIS UTMOST TO BALANCE THE SCALES BETWEEN CONTENDING PARTIES

The fundamental tenets of due process require provision for a "fair trial in a fair tribunal." *In Re Murchison*, 349 U.S. 133, 136 (1955).

The available procedures, under Hawaii's revocation scheme, as constructed and implemented, represents an inherent violation of the due process rights of all drivers, including Petitioners, subjected to the administrative revocation of their licenses.

Under the constructs of HRS, Section 286 et seq., the administration of Hawaii's Administrative Driver License Revocation Act falls solely within the purview of the judiciary.

The initial revocation of a driver's license is undertaken by a judicial officer, the director of the ADLRO. The subsequent evidentiary hearing, if requested, is conducted in a non-adversary setting by an officer of the judiciary. The arrestee may subpoena witnesses and present their testimony through examination. HRS, Section 286-259. the cross-examination of these witnesses is

conducted solely by the adjudicator.HRS, Section 286-259(d)(2).

Finally, the subsequent judicial review is conducted in a non-adversary setting by a judicial officer, a district court judge. HRS Section 286-260. This review presents the first opportunity for a defendant to raise his constitutional defenses and precludes re-litigation of the hearing officer's findings. HRS, Section 286-260. Appendix A, at A-23.

In none of these settings is the state's position advocated by a prosecutor or third-party agent of the ADLRO. In both the hearing and judicial review stages of the proceeding, the only parties involved are the adjudicator and the defendant; the latter may be represented by counsel.

The only instance, under which the revocation process reaches an adversary setting is on appeal to the Hawaii Supreme

Court. In each such cases, as here, the administrative director of the state courts is the respondent and his interests are represented by counsel provided by the state attorney general's office. However, appeals to the Hawaii Supreme Court, in practical terms, take place long after even the most stringent administrative revocation of a driver's license has run its course. Thus, as a matter of due process, such an appeal is rendered meaningless.

The Hawaii Supreme Court's holding, that this procedure presents no violation of due process, was predicated on its finding that there is nothing untoward about a hearing officer asking questions. Appendix A, at A-45-46. This is certainly true in a normal adversary proceeding. However, at issue here, and ignored by the Hawaii Supreme Court, is the fact that in both latter stages of the revocation

procedure, the adjudicator presents questions in a strictly non-adversarial setting. Thus, in the case of a hearing officer attempting to discern the credibility or veracity of witness testimony, the questions must be inherently prosecutorial in nature due to the absence of a state's advocate.

An adversary system is defined as:

> The jurisprudential network of laws, rules and procedures characterized by opposing parties who contend against each other for a result favorable to themselves. In such a system, the judge acts as an independent magistrate rather than the prosecutor; distinguished from inquisitorial system.

Black's Law Dictionary 52 (6th ed. 1990).

On point, was this Court's holding that "if the initial view of the facts

based on the evidence derived from non-adversarial processes as a practical or legal matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question [is] raised." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

In Hawaii, the initial view of the facts derived from the director's revocation of a license or the administrative hearing are completely foreclosed from fair and effective consideration at a subsequent adversary hearing that leads to an ultimate decision because there never is an adversary hearing.

This Court has held that "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136. The inherent deficiencies in Hawaii's revocation scheme, described above, fall

well below this standard.

CONCLUSION

The Hawaii Supreme Court's failure to recognize the full panapoly of protections accorded under the Due Process Clause of the Fourteenth Amendment to the United States Constitution comes at a time when the ability to distinguish such rights could not be more crucial. As legislators attempt to fashion mechanisms to alleviate overwhelmed judicial systems, they have increasingly turned to administrative proceedings in an effort to streamline the administration of justice. Concomitant to the trend, and generally hidden behind the

veil of "administrative proceedings", has been the gradual supplantation of constitutional protections for the individual with unbridled state's power. Most of this has occurred under the aegis' of pressing governmental interests. Such is the case with respect to Hawaii's administrative driver's license revocation scheme. Hence, the ultimate issue presented in this case - where the line of demarcation between the interests of the state and the rights of the individual is to be drawn.

For the reasons presented herein, this Petition for Writ of Certiorari should be granted.

Dated: Honolulu, Hawaii, October, 1993.

Respectfully submitted,

Arthur E. Ross

Arthur E. Ross
(Counsel of Record)

Paul J. Cunney

(Of Cousel)
Attorneys for Petitioners

Appendix "A"

IN THE SUPREME COURT OF THE STATE OF HAWAII

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CHARLES KERNAN, Petitioner-Appellant, v. IRWIN TANAKA, Administrative Director of the Courts, State of Hawaii, Respondent-Appellee

NO. 15908

(CASE NO. AR91-0008
Original Case No. 91-00174)

JETON LEE ALLEN, Petitioner-Appellant, v. IRWIN TANAKA, Administrative Director of the Courts, State of Hawaii, Respondent-Appellee

NO. 15906

(CASE NO. AR91-0017
Original Case No. 91-00201)

PAUL STEWART, Petitioner-Appellant, v. IRWIN TANAKA, Administrative Director of the Courts, State of Hawaii, Respondent-Appellee

NO. 15905

(CASE NO. AR91-0026
Original Case No. 91-00477)

APPEALS FROM THE JUDGMENTS FILED ON DECEMBER 20, 1991

DISTRICT COURT OF THE FIRST CIRCUIT, HONOLULU DIVISION

August 9, 1993

LUM, C.J.,* MOON, KLEIN, LEVINSON, JJ., AND
INTERMEDIATE COURT OF APPEALS CHIEF JUDGE BURNS,
ASSIGNED BY REASON OF VACANCY

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* Chief Justice Lum, who heard oral argument, retired from the court on March 31, 1993. See HRS § 602-10 (1985).

OPINION OF THE COURT BY KLEIN, J.

Petitioners-Appellants Charles Kernan (Kernan), Paul Stewart (Stewart), and Jeton Allen (Allen) (collectively "Appellants") appeal from a district court order affirming their license revocations pursuant to Hawaii Revised Statutes (HRS) chapter 286, Part XIV. (Supp. 1992) (Administrative Revocation Program). Each Appellant was separately arrested for driving under the influence of intoxicating liquor (DUI) in violation of HRS § 291-4[1] (Supp. 1992) and given a notice of administrative revocation.

The Administrative Revocation

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[1] HRS § 291-4 (Supp. 1992) provides in pertinent part:

(a) A person commits the offense of driving under the influence of intoxicating liquor if:
(1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
(2) The person operates or assumes actual physical control of the operation of any vehicle with .10 percent or more, by weight of alcohol in the person's blood.

Program sets out the rules and procedures for license revocations. The process consists of five main stages: 1) notice of license revocation and a thirty-day temporary permit are issued by the police at the time and place of the arrest;[2] 2)

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[2] HRS § 286-252 (Supp. 1992) provides:

> As used in this part, the notice of administrative revocation:
>
> (1) Establishes that the arrestee's driving privilege in this State shall be terminated thirty days after the date of the arrest or such later date as is established by the director under section 286-259 if the director administratively revokes the arrestee's license;
>
> (2) Establishes that date on which the administrative revocation proceedings against the arrestee were initiated; and
>
> (3) Serves as a temporary permit to drive as provided in section 286-255.

HRS § 286-254 (Supp. 1992) provides in pertinent part:

> (a) The notice of
>
> (continued...)

[2](...continued)

administrative revocation shall provide, at a minimum and in clear language, the following general information relating to administrative revocation:

(1) The statutory authority for administrative revocation;

(2) An explanation of the distinction between administrative revocation and a suspension or revocation imposed under section 291-4; and

(3) That criminal charges filed pursuant to section 291-4 may be prosecuted concurrently with the administrative action.

(b) The notice, when completed by the arresting officer and issued to the arrestee, shall contain at a minimum the following information relating to the arrest:

(1) Information identifying the arrestee;

(2) The specific violation for which the person was arrested;

(3) The date issued and the date

(continued...)

an administrative review occurs automatically;[3] 3) an administrative

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[2](...continued)

that the administrative revocation is scheduled to go into effect;

(4) That the arrestee was informed of the sanctions of this part and of the consequences of refusing to be tested for alcohol content of the blood and whether or not the arrestee consented to be tested;

(5) The expiration date of the temporary permit; and

(6) That the arrest will be administratively reviewed.

[3] HRS § 286-258 (Supp. 1992) provides in pertinent part:

> (a) The director shall automatically review the issuance of a notice of administrative revocation, and a written decision administratively revoking the license or rescinding the notice of administrative revocation shall be mailed to the arrestee no later than eight days after the
>
> (continued...)

[3](...continued)

date the notice was issued.

(b) The arrestee shall have the opportunity to demonstrate in writing why the arrestee's license should not be administratively revoked and shall submit any written information within three days of the notice, either by mail or in person, to the director's office or to any office or address designated by the director for that purpose.

(c) In conducting the administrative review, the director shall consider:

(1) Any sworn or unsworn statement or other evidence provided by the arrestee;

(2) The breath or blood test results, if any; and

(3) The sworn statements of the law enforcement officials, and other evidence or information required by section 286-257.

(d) The director shall administratively revoke the arrestee's driver's license if the director determines that:

(1) There existed reasonable suspicion to stop the motor vehicle or the

(continued...)

[3](...continued)

motor vehicle was stopped at an intoxication control roadblock established and operated in compliance with sections 186-162.5 and 186-162.6;

(2) There existed probable cause to believe that the arrestee drove, operated, or was in actual physical control of the motor vehicle while under the influence of intoxicating liquor; and

(3) The evidence proves by a preponderance that the arrestee drove, operated, or was in actual physical control of the motor vehicle while under the influence of intoxicating liquor or while having a blood alcohol concentration of 0.10 or more or that the arrestee refused to submit to a breath or blood

(continued...)

hearing is conducted upon request;[4]

MISSING PAGE 4

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[3](...continued)

test after being informed of the sanctions of this part.

[4] HRS § 286-259 (Supp. 1992) provides in pertinent part:

> (a) If the director administratively revokes the arrestee's license after administrative review, the arrestee may request an administrative hearing to review the decision within five days of the date of the administrative review decision is mailed. The hearing shall be scheduled to commence no later than twenty-five days from the date the notice of MISSING PAGE 4

request;[5] and 5) an appeal of the district

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[5] HRS § 286-260 (Supp. 1992) provides:

> (a) If the director sustains the administrative revocation after the administrative hearing, the arrestee may file a petition for judicial review within thirty days after the administrative hearing decision is mailed. The petition shall be filed with the clerk of the district court in the district in which the offense occurred and shall be accompanied by the required filing fee for civil actions. The filing of the petition shall not operate as a stay of the administrative revocation nor shall the court stay the administrative revocation pending the outcome of the judicial review. The petition shall be appropriately captioned. The petition shall state with specificity the grounds upon which the petitioner seeks reversal of the administrative revocation.
>
> (b) The court shall schedule the judicial review as quickly as practicable, and the review shall be on the record of the administrative hearing without taking of additional testimony or evidence. If the petitioner fails to appear without just cause, the court shall affirm the administrative revocation.
>
> (c) The sole issues before the court shall be whether the director exceeded constitutional or

court's decision may be brought. See HRS §§ 602-5(1) and 641-1(a).

Appellants' licenses were revoked after an administrative review by the Administrative Driver License Revocation Office of the Judiciary of the State of Hawaii (ADLRO). The revocations were affirmed in administrative hearings. Appellants' appeals to the district court asserted that the procedures established by the statutory scheme codified in HRS chapter 286, Part XIV denied them due process of law. The district court affirmed the revocations and ruled the Administrative Revocation Program constitutional. We consolidated the appeals for review because they contain

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statutory authority, erroneously interpreted the law, acted in an arbitrary or capricious manner, committed an abuse of discretion, or made a determination that was unsupported by the evidence in the record.

common issues. The issues on appeal are whether the Administrative Revocation Program facially violates Appellants' due process rights and whether the application of the Administrative Revocation Program violated Appellants' rights by failing to fulfill the Program requirements. For the reasons set forth below, we find no constitutional or other infirmities and affirm.

I. Facts

Police arrested Kernan on August 9, 1991 for DUI in violation of HRS § 291-4 and issued a Notice of License Revocation and a thirty-day driving permit, pursuant to HRS § 286-255. Although notified of the implied consent to submit to a blood or breath test and the penalties for refusing to take either test, Kernan refused to be tested. The ADLRO director reviewed the evidence provided by the law enforcement officers

and revoked Kernan's license. Kernan's requested administrative hearing was held on August 30, 1991. The hearing officer upheld the revocation and Kernan requested judicial review, which was held by the district court on November 18, 1991. Kernan challenged the constitutionality of the revocation process. The district court affirmed the revocation, finding the revocation process constitutional. Kernan now appeals, citing as error: 1) the lack of properly sworn statements of the arresting officer and the unavailability of the entire police report in violation of the requirements of HRS § 286-257(a)(1)(A); 2) alleged due process deficiencies of the Administrative Revocation Program; and 3) the inadmissibility of evidence used to establish probable cause to believe that Kernan was driving under the influence at the time of the arrest as required by HRS

§§ 286-258(d)(2) and 286-259(e)(2).

Police arrested Allen on August 13, 1991 for DUI in violation of HRS § 291-4 and issued a Notice of License Revocation and a thirty-day driving permit, pursuant to HRS § 286-255. He was notified of the implied consent law and submitted to a breath test that showed a .142 percent blood alcohol content. The director of the ADLRO reviewed the evidence and revoked Allen's license. Allen requested an administrative hearing, which was held on September 20, 1991. The hearing officer upheld the revocation and Allen requested judicial review, which was held in district court on December 2, 1991. The district court affirmed the revocation and Allen now appeals. In addition to the due process and the lack of proper documents arguments which Kernan raises, Allen claims that the transcript from his administrative hearing should not

have been entered into the record because it was not properly certified.

Police arrested Stewart on September 3, 1991 for DUI in violation of HRS § 291-4 and issued a Notice of License Revocation, pursuant to HRS § 286-255. He did not receive a temporary permit because his license was already under suspension due to a prior incident. He was notified of the implied consent law and submitted to a breath test that showed a .129 percent blood alcohol content. The director of the ADLRO reviewed the evidence and revoked Stewart's license. Stewart requested an administrative hearing, which was scheduled for October 2, 1991. Stewart failed to appear at the hearing, claiming that he had only received notice the day before and was unable to attend. The hearing officer affirmed the revocation and Stewart requested judicial review, which ensued on

December 2, 1991. Like Kernan and Allen, Stewart raised similar constitutional claims. The district court affirmed his revocation and Stewart now appeals.

The issues before this court are: 1) Does the Administrative Revocation Program, on its face, violate Appellants' due process rights? 2) Were improper documents submitted to the ADLRO? 3) Were the transcripts from Allen's administrative hearing properly certified? 4) Did probable cause exist to believe that Kernan was driving under the influence of intoxication liquor? and 5) Does Stewart have standing to challenge the Administrative Revocation Program?

II. Jurisdiction

We raise, sua sponte, the issue of whether we have jurisdiction over these appeals. Appellate courts have an obligation to insure they have jurisdiction to hear and determine each

case. State v. Moniz, 69 Haw. 370, 742 P.2d 373 (1987). HRS § 286-260 does not specifically provide for an appeal beyond the district court level.[6] Our inquiry is whether the lack of a statutory provision providing for a further appeal is evidence that the legislature did not authorize an appeal beyond the district court level or whether the omission of statutory authority supports a conclusion that the legislature intended the general statutes governing appeals to be applicable. See HRS §§ 602-5(1)[7] and 641-1(a)[8] (1985).

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[6] Although the previous license revocation statute sections provided for an appeal of a district court decision to the supreme court, the revocation action under those sections was taken by the district court. No administrative program existed. By directing where an appeal of the hearing officer's decision should be taken, HRS § 286-260 prevents direct appeals of the administrative revocation to the circuit or supreme court.

[7] HRS § 602-5 (1985) provides in pertinent part:

> The supreme court shall have jurisdiction and powers as follows:
> (1) To hear and determine

HRS § 602-5(1) gives the supreme court appellate jurisdiction over cases "properly brought before it on any appeal allowed by law from any other court or agency[.]" Furthermore, HRS § 641-1(a) provides in part that "[a]ppeals shall be allowed . . . from all final judgments, orders, or decrees of circuit and district

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> all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency.

HRS § 641-1 (1985) provides in pertinent part:

> (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court, to the supreme court or to the intermediate appellate court, except as otherwise provided by law and subject to the authority of the intermediate appellate court to certify reassignment of a matter directly to the supreme court and subject to the authority of the supreme court to reassign a matter to itself from the intermediate appellate court.

courts . . . except as otherwise provided by law." (Emphasis added.) Thus, any district court final judgment, order, or decree may be appealed to the supreme court, unless a specific statute provides otherwise. Arguably, HRS § 286-260 provides an exception to the general appealability of district court judgments by providing that an appeal from the administrative hearing decision shall be taken to the district court. We concluded, however, that the omission of language specifically providing further appeal to this court does not signal finality at the district court level. This is because HRS § 286-260 makes no attempt, by its own terms, to limit the general right of appeal from all final district court judgments as set out in HRS §641-1(a).

We recognize the potential hardships of license revocation, and

conclude that, had the legislature intended to limit an aggrieved person's rights, it would have included in the Administrative Revocation Program specific statutory language terminating a further appeal. Thus, we hold that, pursuant to HRS §§ 602-5(1) and 641-1(a), jurisdiction properly lies in this court to hear and determine appeals from district court judgments after an administrative hearing.

III. The Statute

Administrative revocation begins when a police officer stops a motorist suspected of DUI, arrests him or her,[9] and

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[9] HRS § 286-255 (Supp. 1992) provides in pertinent part:

> Whenever a person is arrested for a violation of section 291-4, on a determination by the arresting officer that:
> ****
> (2) There was probable cause to believe that the arrestee was driving, operating, or in actual physical control of the

takes possession of the arrestee's driver's license, giving the arrestee notice of the revocation action. The police also present the arrestee with a thirty-day temporary driving permit. HRS § 286-254 requires informing the arrestee

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> motor vehicle while under the influence of intoxicating liquor;
>
> the arresting officer shall immediately take possession of any license held by the person and request the arrestee to take a test for concentration of alcohol in the blood. The arresting officer shall inform the person that the person has the option to take a breath test, a blood test, or both. The arresting officer shall also inform the person of the sanctions under this part, including the sanction for refusing to take a breath or a blood test. The arresting officer shall then complete and issue to the arrestee a notice of administrative revocation and shall indicate thereon whether the notice shall serve as a temporary permit. The notice shall serve as a temporary permit, unless at the time of arrest the arrestee was unlicensed, the arrestee's license was revoked or suspended or the arrestee had no license in the arrestee's possession.

of the specific violation for which he or she is arrested, the consequences of refusing to be tested for blood-alcohol content, that the revocation will be administratively reviewed, and that he or she may request an administrative hearing after the review. HRS § 286-254.

An administrative review of the police officer's actions occurs automatically after the arrest. HRS § 286-258. the arrestee is allowed to submit written information for the reviewing officer to consider along with the breath or blood test results and the sworn statements of the law enforcement officials. HRS § 286-258(b)-(c) and HRS § 286-257. The reviewing officer will revoke the arrestee's license if it is determined that: (1) reasonable suspicion to stop the driver existed; (2) probable cause was shown that the driver operated the vehicle under the influence of

intoxicating liquor; and (3) the evidence proved by a preponderance that the arrestee did in fact drive under the influence. HRS § 286-258(d). A written decision is mailed to the arrestee within eight days after the arrest and issuance of the notice of the revocation. HRS § 286-258(a). If the arrestee's license is revoked,[10] he or she is further informed of the right to request an administrative hearing, of the right to review the evidence, and all applicable procedures. HRS § 286-258(f).

The arrestee is provided five days from the mailing date of the administrative review decision to request an administrative hearing. HRS § 286-259(a). The hearing must be scheduled to

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[10] If the reviewing officer revokes the license, the driver may still drive with the thirty-day driving permit. Thus, the revocation does not become effective until the permit expires. This allows the driver to continue driving until the full administrative process is completed.

commence no later than twenty-five days after the notice of revocation was issued, unless continued by the director for good cause. HRS § 286-259(a). The arrestee may be represented by counsel. HRS § 286-259(c). The director conducting the hearing (hearing officer) has the authority to examine witnesses and take testimony, receive and determine the relevant evidence, issue subpoenas, regulate the hearing, and make a final ruling. HRS § 286-259(d). The hearing officer may affirm the revocation if: (1) reasonable suspicion to stop the driver is found to have existed; (2) probable cause to believe that the driver was operating the vehicle under the influence of intoxicating liquor is shown; and (3) there is sufficient evidence to prove by a preponderance that the driver did in fact drive under the influence. HRS § 286-259(e). The hearing is recorded in a

manner "to be determined by the director." HRS § 286-259(h). If the hearing is continued for good cause at the request of the director, the director is required to extend the arrestee's temporary driving permit during the period of the delay. HRS § 286-259(j). The final written decision of the director is mailed to the arrestee within five days of the hearing.[11] HRS § 286-259(i).

An adverse decision of the hearing officer may be appealed to the district court by filing a petition for judicial review within thirty days after the adverse decision is mailed. HRS § 286-260(a). There is no stay of the revocation pending the appeal. HRS § 286-260(a). Judicial review is confined to

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[11] The twenty-five day hearing commencement requirement and the five-day decision deadline insure that the final administrative hearing decision is rendered prior to the expiration of the thirty-day temporary permit when the revocation becomes effective.

the record of the administrative hearing. HRS § 286-260(b). The issues on appeal may include whether the director exceeded his authority, erroneously interpreted the law, acted in an arbitrary or capricious manner, committed an abuse of discretion, or made a determination that was unsupported by the evidence. HRS § 286-260(c). An affirmation of the revocation by the district court may be appealed to the supreme court under the general jurisdiction statutes. See HRS § 602-5(a) and 641-1(a). (See Part II, supra).

The Administrative Revocation Program allows conditional permits to be issued under certain circumstances. HRS § 286-264.[12] The director may issue this

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[12] HRS § 286-264 (Supp. 1992) provides in pertinent part:

> (a) If an arrestee subject to administrative revocation under this part submitted to a breath or blood test and has no prior alcohol enforcement contacts, the director may, at the request of the

arrestee at the administrative hearing, issue a conditional permit allowing the arrestee to drive after a minimum period of absolute license revocation of thirty days if one or more of the following conditions are met:

(1) The arrestee is gainfully employed in a position that requires driving and will be discharged if the arrestee's driving privileges are administratively revoked; or

(2) The arrestee has no access to alternative transportation and therefore must drive to work or to a substance abuse treatment facility or counselor for treatment ordered by the director under section 286-261.

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(d) A conditional permit may include restrictions allowing the arrestee to drive:

(1) Only during hours of employment for activities solely within the scope of the employment;

type of permit with or without conditions. HRS § 286-264(d).

IV. Constitutional Issues

Appellants submit that the Administrative Revocation Program is constitutionally deficient because it fails to provide sufficient procedural protection to a licensed driver before and after his or her license is revoked. We are called upon to examine whether the procedures of the Administrative Revocation Program provide licensed drivers with adequate due process safeguards.

> In general a claim of a due process right to a hearing requires a two step analysis: (1) is the particular interest which the

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(2) Only during daylight hours; or

(3) Only for specified purposes or to specific destinations.

> claimant seeks to protect by a hearing "property" within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is "property" what specific procedures are required to protect it.

Aquiar v. Hawaii Housing Authority, 55 Haw. 487, 495, 522 P.2d 1255, 1266 (1974).

A. Constitutionally Protected Interest

The first step of the Aquiar analysis examines whether the constitution protects the interest at risk. A driver's license is a constitutionally protected interest and due process must be provided before one can be deprived of his or her license. Bell v. Burson, 402 U.S. 535, 539 (1971). Although driving is a "privilege" rather than a constitutional "right," once conferred, a license becomes a constitutionally protected property

interest.[13] Illinois v. Batchelder, 462 U.S. 1112, 1116-17 (1983); Mackey v. Montrym, 443 U.S. 1, 10 (1978); Dixon v. Love, 431 U.S. 105, 112 (1976); Bell, 402 U.S. at 539.

B. Due Process Analysis

Accepting that a driver's license is a protected property interest, the issue becomes "what process is due to protect against erroneous deprivation of that interest." Batchelder, 462 U.S. at 1116-17 (citing Mackey, 443 U.S. at 10). Due process encompasses the opportunity to be heard at a meaningful time and in a meaningful manner. Barry v. Carchi, 443 U.S. 55, 66 (1979); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); see Evans v. Takao, 74 Haw. 267, 282, 842 P.2d 255, 262 (1992); Sandy Beach Defense Fund v. City

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[13] Because a driver's license is a constitutionally protected interest, we need not consider whether, as argued by Appellants, reputation interests are also constitutionally protected interests.

Council, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976); see Evans, 74 Haw. at 282, 842 P.2d at 262; Sandy Beach, 70 Haw. at 378, 773 P.2d at 261.

The appropriate process due in a given situation:

> requires consideration of three distinct factors: [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail.

Mathews, 424 U.S. at 334-35; see Sandy Beach, 70 Haw. at 378, 773 P.2d at 261, and Silver v. Castle Memorial Hospital, 53 Haw. 475, 484, 497 P.2d 564, 571 (1972).

In Love, the United States Supreme Court reviewed the authority of the Secretary of State of Illinois to suspend or revoke a license without a preliminary hearing. The statute required the Secretary to provide written notice of the discretionary suspension but did not require a presuspension hearing. Love, 431 U.S. at 109-10. A hearing, however, was available "as early as practical" after the suspension. Id. at 110. The United States Supreme Court, using the Mathews analysis, found that the revocation procedures were sufficient to defeat the appellant's due process claim. Id. at 112-15.

In Mackey, the United States Supreme Court examined a Massachusetts

statute that provided for the immediate ninety-day suspension of a driver's license when the driver refused to take a breath test after being arrested for DUI. The revocation was subject to an immediate review by the Registrar, but no hearing was provided. Mackey, 433 U.S. at 3-5. An aggrieved driver had the right to appeal an adverse decision of the Registrar to the Board of Appeals, but the appeal did not stay the revocation. Id. at 6 n.6. Upon request, the decision of the Board was subject to judicial review. Id. at 10.

The Court used the Mathews analysis to uphold the Massachusetts administrative revocation program and followed its decision in Love on the basis that Mackey, like Love, involved "a statutory scheme for administrative suspension of a driver's license for statutorily defined cause without a

presuspension hearing." Id. at 11. In analyzing the Mathews factors, the Court stated, "[n]either the nature nor the weight of the private interest involved in this case compels a result contrary to that reached in Love." Id. at 12. Thus, "[i]n summary, [the court] conclude[d] here, as in Love, that the risk of error inherent in the presuspension procedures . . . is not so substantial . . . as to require [it] to depart from the 'ordinary principle' that something less than an evidentiary hearing is sufficient . . . .'" Id. at 17 (citation omitted). The court, however "conclude[d], as [it] did in Love, that the compelling interest in highway safety justifies . . . making a summary suspension effective pending the outcome of the prompt postsuspension hearing available." Id. at 19.

In Batchelder, the United States Supreme Court again followed the Mathews

analysis in its examination of Illinois' administrative license revocation scheme. The Court compared the Illinois provisions with those involved in the Mackey case and determined that the statute, providing a presuspension hearing, gave even greater due process protection than was provided in Mackey. The Court held that the Mathews analysis required an affirmation of the validity of the Illinois statute.

Love, Mackey, and Batchelder analyzed license revocation and suspension statutes within the Mathews framework; therefore, it is within this framework that we analyze the constitutionality of Hawaii's Administrative Revocation Program.

C. Hawaii's Administrative Revocation Program

1. Private interest affected

When examining the private interest affected, we must consider not

only the interest itself, but also "[t]he duration of any potentially wrongful deprivation of a property interest." Batchelder, 463 U.S. at 1117. Here, the private interest affected is the right to drive, and Appellants face potential economic hardship and personal inconvenience if their licenses are revoked. The nature of Appellants' interests, however, "is not so great as to require us 'to depart from the ordinary principle . . . that something less than [a predeprivation] evidentiary hearing is sufficient . . . .'" Love, 431 U.S. at 113 (citing Mathews, 424 U.S. at 343); see also Mackey, 443 U.S. at 13.

We also consider the possible length of deprivation. Pursuant to HRS § 291-4(b)(1)(B) (Supp. 1992), the first DUI conviction mandates the court to impose a ninety-day license suspension. In Mackey, the Massachusetts statute provided a

ninety-day suspension, while in Love, Illinois permitted a one-year suspension with the potential for an indefinite license revocation. No greater deprivation is possible in the instant cases under Hawaii law.

Furthermore, if an arrestee submits to a blood or breath test and has no previous alcohol enforcement contacts, HRS § 286-262 provides that a conditional permit may be issued at the administrative hearing. The considerations pertinent to the grant of a conditional permit include employment needs and transportation to substance abuse treatment facilities. Thus, the allowance of a conditional permit provides possible relief for those who would be most harmed by a loss of license.

Although we recognize the importance of the interest at stake, we conclude that the existing statutory

procedures adequately protect citizens from the possibility of wrongful license suspensions. If a wrongful suspension were occasioned at the administrative level, timely judicial review is available to correct any deficiencies in the process.

The United States Supreme Court has upheld license revocation programs that provide less process than does Hawaii's program. In Love and Mackey, arrestees received no hearing prior to license suspension. In accord with the United States Supreme Court's assessment in Batchelder, we note that the Hawaii Administrative Revocation Program "clearly grants a driver the right to have a hearing before his license is suspended. Thus, [Appellants] can seek no solace in the first step of the [Mathews] analysis." Batchelder, 463 U.S. at 1118.

2. Risk of erroneous deprivation

To examine the risk of erroneous deprivation, we briefly review the procedures set out in the Administrative Revocation Program. After the arrest, notice of revocation, and issuance of a temporary license by the police, an administrative review occurs. The arrestee may provide the reviewing officer with written evidence and then request an administrative hearing upon revocation of his license by the reviewing officer. At the administrative hearing, the arrestee may introduce evidence and subpoena those who provided statements. Both the administrative review and hearing occur before license revocation becomes effective. Judicial review, if requested, is not guaranteed to occur before a license is suspended and, in practice, ordinarily occurs after the expiration of the thirty-day permit.

By contrast, in Mackey and Love,

no presuspension, evidentiary hearing was required. Such a hearing was available only after license revocation, followed in turn by discretionary judicial review. In Batchelder, an evidentiary hearing was held prior to license revocation.

The Court in Mackey stated that same-day review gave the arrestee the opportunity to "tell his side of the story . . . to obtain correction of clerical errors, and to seek prompt resolution of any factual disputes he raises as to the accuracy of the officer's report . . . ." Mackey, 443 U.S. at 15.

> And, when prompt post deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as

> a responsible governmental official warrants them to be. See, e.g., Barry v. Barchi, 443 U.S. 55 (1979), 64-65; Mathews v. Eldridge, 424 U.S. at 334.

Mackey, 443 U.S. at 13. The fact that Hawaii's procedure provides for a predeprivation review and hearing "abundantly weights this second part of the [Mathews] analysis in favor of the constitutionality of [the Revocation Program]." Batchelder, 463 U.S. at 1118.[14] Hawaii's procedure allows the arrestee to correct any mistakes that may have been made by the director as well as to challenge the reports and statements presented against him. See HRS § 286-

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[14] The fact that Batchelder and Mackey deal with revocations for refusing to submit to a breath or blood test does not deter us from utilizing their analyses. In both cases, the United States Supreme Court examined the procedures followed for the revocation and suspension of driver's licenses. The fact that licenses were suspended for failure to submit to a test rather than for driving under the influence is inconsequential.

258(f) and 259(d). The arrestee is also given the opportunity to confront those who submitted statements and reports. Id. These procedures provide a reasonable and reliable basis for ascertaining the facts.

Due process does not require error-free determinations. Mackey, 443 U.S. at 13. Because the United States Supreme Court has found that presuspension hearings are not required for driver's license suspensions, Hawaii's procedures, which provide for such hearings, sufficiently assure reliable results and provide adequate due process. Further, judicial review prior to the revocation "would be unlikely to have significant value in reducing the number of erroneous deprivations." Love, 431 U.S. at 114.

Appellants complain that the administrative hearing is insufficient to provide due process of law because the hearing officer's review is limited in

scope and the arrestee cannot raise constitutional issues for disposition. The hearing approved by the Supreme Court in Batchelder was presuspension and limited to whether reasonable grounds existed to arrest the driver and whether the driver was informed of the penalties for refusing the breath test. Batchelder, 463 U.S. at 1114. Here, although the hearing officer cannot pass upon the constitutionality of the statute directly,[15] he or she determines the validity of basic facts that set the stage for the court to consider constitutionally significant matters on review. For example, the hearing officer determines whether reasonable suspicion and probable cause existed, whether the arrestee was properly informed of the procedures, and

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[15] An administrative agency "generally lacks power to pass upon the constitutionality of a statute." HOH Corp. v. Motor Vehicle Industry Licensing Board, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987).

whether proper evidence exists for the revocation, thereby deciding matters that will directly affect and perhaps determine the arrestee's constitutional claims.

The legislature has chosen to provide an arrestee with an administrative review and hearing prior to the revocation of his or her license. These procedures provide sufficiently reliable results to protect against erroneous revocations and satisfy due process concerns.

3. Governmental interest

The third part of the Mathews test consists of an evaluation of the governmental interest involved. In DUI cases, public safety is the main governmental concern. "States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." Mackey, 443 U.S. at 17 (citations omitted).

The Administrative Revocation Program allows the State to achieve these goals without overburdening individuals or the judicial system. Requiring presuspension judicial review would greatly delay valid revocations without a concomitant benefit to the system, because most errors can be rectified through the administrative process. Presuspension judicial hearings or an automatic stay of revocation pending judicial review would likewise increase the fiscal and administrative burden on the courts, because arrestees would be encouraged to request judicial intervention simply to retain their licenses.

We conclude that the additional safeguard of presuspension judicial intervention is neither necessary as a component of due process nor required to exonerate the legitimate interests of arrestees when weighted against the strong

public policy of removing drunken drivers from our highways.

4. Balancing the factors

As we have stated, though constitutionally protected, one's driver's license can be revoked where due process has been provided. The administrative review and hearing processes minimize the chance of an erroneous deprivation by providing meaningful opportunities to correct errors and dispose of challenges, helping to insure a reliable result. Finally, the governmental interest in public safety and curbing drunk driving is an important interest properly advanced by the Administrative Revocation Program.

Appellants claim that the revocation process invalidly shifts the burden of proof to the arrestee. This argument overlooks the fact that the arrestee does not have to present any evidence until the reviewing officer

determines that sufficient grounds for the revocation exist. Thus, the police have the initial burden to prove that: (1) reasonable suspicion existed to stop the vehicle; (2) probable cause existed to believe the arrestee was driving under the influence; and (3) by a preponderance of the evidence, the arrestee did in fact drive under the influence. Only after these burdens have been met does the arrestee carry any burden of contrary proof.

Appellants further complain that the Judiciary acts both as prosecutor and adjudicator in the revocation process, thus depriving Appellants of procedural due process and fairness. The reviewing and hearing officers, however, do not act as "prosecutors." Instead, they are decision makers who review the evidence. The fact that the arrestee or witness may be questioned by the hearing officer

should not suggest that he or she is a "prosecutor" any more than a judge's inquiry of a witness makes the judge a "prosecutor." The hearing officer is permitted to query witnesses in order to make a fully informed decision. Appellants have failed to show that the ADLRO officers have an interest in the outcome of the matter to "overcome the 'presumption of honesty and integrity' that attaches by virtue of [their] office." Cf. Sifagaloa v. Board of Trustees of the Employees' Retirement System of the State of Hawaii, 74 Haw. 181, 193, 840 P.2d 367, 372 (1992) (citations omitted).

Following the United States Supreme Court, we hold that the interest in a driver's license is not so great that more than an administrative review and hearing are needed to comport with the requirements of due process. In

Batchelder, the Court stated, "[a]gain, the fact that we upheld a more summary procedure in Mackey refutes the suggestion that the Illinois scheme runs afoul of the [Mathews] test." Batchelder, 462 U.S. at 1118. An analogous situation exists here, justifying our holding that Hawaii's Administrative Revocation Program does not offend the principles of Mathews and is, therefore, constitutional.

V. The Revocation Program As Applied to Appellants

Appellants also argue that the Administrative Revocational Program was unconstitutionally applied to them, citing various points of error in the process. Some points are brought individually while others are common to all three Appellants. We address them now.

A. Proper Documents

1. Sworn statements

HRS § 286-257 requires that the

following documents be forwarded to the ADLRO director: 1) the arrest report and the sworn statement of the arresting officer; 2) the sworn statement of the person responsible for the maintenance of the breath testing equipment; and 3) the sworn statement of the person who conducted the test. HRS § 286-257(a)(1)-(3).[16]

Appellants argue that the sworn statements presented in their cases were not sworn "in the connotative sense" and should not be used as evidence against them. Appellants claim that the sworn statements were somehow defective because they were neither attested to before a third party, nor were the officers subject to penalties in the event they submitted

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[16] HRS § 286-257 also requires that a copy of the notice of administrative revocation issued to the arrestee, any driver's license taken from the arrestee, and a listing of any prior alcohol enforcement contacts involving the arrestee be submitted to the ADLRO director.

false statements.

The statute requires sworn statements, not statements given under oath or even notarized statements. The lack of statutory language creating these additional requirements raises a presumption that a statement sworn to by the officer is sufficient. The three statements submitted in each of the Appellants' cases bore the signature of that person and the statement, "I, (officer's name), swear that the following is true and correct." The statute requires nothing more.

An examination of the use to which the statements are put strengthens our view that statements need not be notarized. The reviewing and hearing officers utilize the statements to determine the facts of the case. An arrestee may subpoena the police officers who submitted the statements to have them

testify under oath. HRS § 286-259(g). Further, HRS § 710-1063(g) provides penalties for false statements:

> (1) A person commits the offense of unsworn falsification to authorities if, with an intent to mislead a public servant in the performance of his duty, he:
>
> (a) Makes any written statement, which he does not believe to be true, in . . . a record or report required by law to be submitted to any governmental agency;
>
> . . .
>
> (2) Unsworn falsification to authorities is a misdemeanor.

HRS § 710-1063 (1985).

Therefore, given the criminal penalty for making a false statement and the arrestee's ability to require the officer to testify under oath, we conclude that sufficient mechanisms exist to insure due process and fairness in the presentation of facts to ADLRO officers.

2. Complete police reports

Appellants argue that their license revocations should have been vacated because the entire police report was not submitted to the ADLRO. HRS § 286-257(a)-(b) requires that a copy of the arrest report and the sworn statement of the arresting officer be submitted to ADLRO director. These sections further provide that the report and statement should set forth facts establishing that: (1) reasonable suspicion existed for the stop; (2) probable cause existed to believe that the arrestee operated the vehicle while under the influence of intoxicating liquor; (3) the arrestee was informed of the sanctions for refusing to be tested for blood alcohol concentration; and (4) the arrestee refused or agreed to be tested. HRS § 286-257(a)-(b). Appellants claim that the arrest report required by the statute means the entire police report and not merely the Offender-

Based Transaction Statistics/Computerized Criminal History Arrest report (OBTS/CCH) that the police submitted.

The law provides no statutory definition for the term "arrest report," and the legislative history fails to give us guidance. Our inquiry is whether the OBTS/CCH, along with the police officer's statement, is sufficient to establish the facts enumerated in HRS § 286-257.

The arresting officer's sworn statement, by itself, establishes the required facts. The statement is formatted to address each fact and to provide the reasons or supporting details for each. The OBTS/CCH supplements the sworn statement and includes objective data regarding the arrestee and the arrest, the charges against the arrestee, and the names of the police officers involved. The complete police report, which was included in Kernan's record,

provides greater detail regarding the arrest and subsequent actions, but does not add any significant facts.

The reviewing and hearing officers do not need a complete police report to review and determine the elements required for revocation. Nevertheless, as a safeguard, the arrestee may, through the subpoena issued by the hearing officer, require the police officer to bring the complete police report to the administrative hearing.[17] See HRS § 286-259(d)(4). This allows the arrestee to introduce the police report at the hearing when conflicts or discrepancies exist between the report and the arrestee's version of the events.

Therefore, the OBTS/CCH, along

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[17] This would occur after the reviewing officer had revoked the arrestee's driver's license. The fact that the reviewing officer never considers the entire police report is inconsequential. The statute is satisfied if the reviewing officer has the OBTS/CCH.

with the arresting officer's statement, fulfill the requirements of HRS § 286-257. HRS § 286-257 does not require the complete police report.

B. Transcripts

Allen argues that the transcript of his administrative hearing was not transcribed by a certified court reporter and that it was not properly certified.[18] "The general rule is that an issue which was not raised in the lower court will not be considered on appeal. An appellate court will deviate from this rule only when justice so requires." Hong v. Kong, 5 Haw. App. 174, 177, 683 P.2d 833, 837 (1984) (citations omitted); See also Bertelmann v. Tass Assoc., 69 Haw. 95, 103, 735 P.2d 930, 935 (1987) ("A judgment

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[18] Allen claims that HRS chapter 606 and District Court Rules of Civil Procedure Rule 72(d)(1) require that transcripts entered into the record in district court be transcribed by a court reporter or certified by an appropriate person.

will not ordinarily be reversed based on a theory an appellant failed to raise at the trial level unless justice so requires." (citing Earl M. Jorgensen Co. v. Mark Construction, Inc., 56 Haw. 466, 540 P.2d 978 (1975))). Allen did not raise this issue below and has made no showing that the transcripts were inaccurate or that he was prejudiced by them. Therefore, we do not address this issue.

C. Absence of Probable Cause

Kernan claims that he was illegally seized because the police officer ordered him out of his vehicle without cause in violation of State v. Kim, 68 Haw. 286, 711 P.2d 1291 (1985). Thus, Kernan argues that the police officer's observations[19] made outside of the vehicle should be excluded under the

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[19] The police officer testified at the administrative hearing that he observed that Kernan was unsteady on his feet, had a strong odor of alcohol, and had red and watery eyes.

exclusionary rule. Furthermore, he argues that no support for the finding of probable cause exists, because the district court discredited the hearing officer's finding of fact supporting probable cause.[20] Kernan's argument, which hinges on the determination that the seizure was illegal, concludes that his license revocation should be vacated because of the lack of evidence to support the finding that probable cause existed to believe that he drove while under the influence, as required by HRS § 286-

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[20] The hearing officer, in his Findings of Fact, Conclusions of Law, and Decision, found that Kernan, "[w]ithout instruction from the police officer . . . came out of his vehicle. The officer then noted physical indicia displayed by the arrestee which were sufficient to cause the officer to reasonably conclude that the arrestee was under the influence of intoxicating liquor." the district court correctly determined that no evidence exists in the record to support the finding that Kernan exited his vehicle voluntarily. The fact that the officer noticed Kernan's physical condition after Kernan was outside of the car, however, is well established by the record.

259(e)(2).

Although there is no evidence that Kernan voluntarily exited the vehicle, there is similarly no evidence that he was ordered out.[21] At the ADLRO hearing, Kernan's attorney established that the police officer's observations were made after Kernan left the vehicle. The police officer, however, was never asked if he ordered Kernan out of the vehicle. Furthermore, Kernan failed to testify that he had been ordered from his vehicle.

If Kernan exited the vehicle voluntarily, the police officer's observations are admissible to establish

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[21] In his reply brief, Kernan argues that the district court found that he was ordered out of his vehicle by the police officer. the court found, however, that no evidence existed showing that Kernan exited voluntarily. The court made no determination that the officer ordered Kernan to exit the vehicle. The lack of evidence of a voluntary exit does not lead us irrefragably to the conclusion that Kernan was ordered out of the vehicle.

probable cause. If, however, Kernan were ordered to exit the vehicle, the issue whether an illegal seizure occurred requires further discussion. For the following reasons, we hold that, under the facts and circumstances surrounding his arrest, even if Kernan had been ordered from his vehicle, such action was valid and his argument fails. Thus, whether Kernan was ordered out or exited the vehicle voluntarily is not legally significant.

Case law establishes that a vehicular stop followed by police questioning of the driver constitutes a seizure for purposes of the fourth and fourteenth amendments. State v. Wyatt, 67 Haw. 293, 299, 687 P.2d 544, 549 (1984). The United States Supreme Court has ruled that traffic stops are valid without probable cause due to the limited nature of the detention. Delaware v. Prouse, 400

U.S. 648, 654 (1979); see also Wyatt, 67 Haw. at 299-300, 687 P.2d at 549. Key to the analysis is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Pennsylvania v. Mimms, 434 U.S. 106, 109 (citing Terry v. Ohio, 291 U.S. 1 (1967)). Thus, given sufficient articulable facts, a police officer may stop and question a driver without probable cause. HRS § 286-255 only requires the traffic stop be supported by "reasonable suspicion."

When a valid stop has occurred, the issue becomes at what point may a police officer legally order a driver out of his or her vehicle. In Kim, this court ruled that Kim was illegally seized because the police officer did not have a sufficient basis to order him out of the vehicle. Kim, 68 Haw. at 291, 711 P.2d at 1294. In that case, a police officer

stopped Kim for driving through a red light. Id. at 288, 711 P.2d at 1293. The officer then asked Kim to step out of the vehicle, based solely on his observations of the traffic violation. Id. The court held that the police must have "at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a vehicle after a traffic stop." id. at 290 (emphasis added).[22] Ordering the driver to exit the vehicle is an extension of the

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[22] A traffic violation in and of itself does not supply reasonable articulable facts to support an order to exit the vehicle. Kim distinguished Wyatt and State v. Kuba, 68 Haw. 184, 706 P.2d 1305 (1985), stating that in those cases, the police had articulable facts to justify ordering the drivers out of their vehicles. Id. at 290-91. Wyatt was stopped for driving without her headlights illuminated. In conversation with the officer, Wyatt admitted to have been drinking earlier. She was then asked to exit her car. Kuba was observed driving at five miles per hour while straddling two lanes of traffic. After a traffic stop, Kuba was asked for his license. Upon noticing Kuba's apparent inebriated condition, the officer asked Kuba to step out of the vehicle.

seizure that must be accompanied by sufficient facts to support the officer's action. Probable cause is, therefore, not required to support an exit order.[23]

In Kim, this court did not attempt to specify the facts that could be used by an officer to develop reasonable suspicion of criminal activity. Although a motorist's disregard of a red light was insufficient, Kim did not prohibit police officers from using traffic violations as a partial basis for suspecting criminal activity. Furthermore, Kim did not require that police observe a motorist to

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[23] Usually, the police administer a field sobriety test consisting of specific procedures when a driver has been stopped as a DUI suspect. If a driver does not exit voluntarily, the police must order him or her out of the vehicle even though probable cause to arrest may not have been established. Should the suspect fail the test, an arrest will ensue. Thus, it is the test failure that provides the police with probable cause to arrest. We do not require the police to have probable cause to arrest prior to the administration of the field sobriety test because such a requirement unduly burdens law enforcement.

display certain alcohol specific traits, such as blood-shot eyes, slurred speech, or alcoholic breath, in order to support an officer's reasonable belief that a crime had been committed. Kim simply provides that the police must have sufficient facts to believe that a crime has been committed before requiring a driver to exit his or her vehicle. Id.

In analyzing the reasonableness of the belief that a crime has been committed, the totality of circumstances, including the time, place, and length of detention must be considered. State v. Paahana, 66 Haw. 499, 666 P.2d 592 (1983); State v. Melemai, 64 Haw. 479, 643 P.2d 541 (1982).

In the instant case, as required by Kim, the police officer observed specific articulable facts that formed his reasonable belief that the crime of DUI was being committed. At 2:00 a.m., the

officer observed Kernan driving 45 miles per hour in a 25 miles per hour zone while weaving out of his traffic lane and into the oncoming traffic lanes.[24] These traffic violations and the totality of the circumstances surrounding them provided the officer with a reasonable factual basis to believe that the crime of DUI was being committed. Without question, the traffic stop was justified and, pursuant to Kim, we conclude that the officer was permitted to invite Kernan to exit his vehicle for further investigation.

The facts in Kim differ from the instant case because the police officer in Kim possessed insufficient facts to form the reasonable belief that Kim was engaged in any criminal activity justifying an exit order. The simple disregard of a red

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[24] Kernan was arrested and charged with DUI, speeding, and weaving in violation of HRS §§ 291-4 (Supp. 1992), 291C-102 (1985), and 291C-38(c) (1985), respectively.

light by a driver provided an insufficient basis for the officer to reasonably conclude that a crime had been committed. The instant facts, on the other hand, satisfy the Kim test. Therefore, whether Kernan was ordered out or voluntarily exited his vehicle, the officer's ensuing observations of his physical condition were properly utilized by the hearing officer to satisfy the requirement of HRS § 286-259(e)(2) that probable cause existed to believe that Kernan drove while under the influence.[25]

D. Lack of Standing

Finally, the State claims that Stewart does not have standing to challenge the constitutionality of the statute because his license was already suspended when he was arrested. The State argues that Stewart was not harmed by the

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[25] Given our holding, we do not reach the issue of whether the exclusionary rule would apply to civil administrative proceedings such as this.

revocation process because no evidence existed that the duration of his suspension was enhanced in any respect. Because his license was already suspended, however, Stewart could have suffered revocation for a year instead of merely ninety-days.[26] Thus, Stewart was

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[26] HRS § 286-261 (Supp. 1992) provides in pertinent part:

> . . . .
> (b) The periods of administrative revocation which may be imposed under this part are as follows:
> (1) Three months, if the arrestee's driving record shows no prior alcohol enforcement contacts during the five years preceding the date of arrest;
> (2) One year if the arrestee's driving record shows one

sufficiently aggrieved to have standing to challenge the constitutionality of the administrative revocation program.

VI. Conclusion

We hold that HRS chapter 286 Part XIV, the Administrative Revocation of Driver's License law, is constitutional because an arrestees' due process rights are fully protected. Further, the Administrative Revocation Program was applied in a constitutional manner to each Appellant.

Affirmed.

Arthur E. Ross
for plaintiffs-appellants

Edwin L. Baker, Deputy

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prior alcohol enforcement contact during the five years preceding the date of arrest.

Attorney General,
for respondent-appellee

Appendix "B"

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

CHARLES D. KERNAN, Petitioner, vs. IRWIN TANAKA, Administrative Director of the Courts, State of Hawaii, Respondent.	AR91-0008 Original Case No. 91-00174 JUDGMENT ON APPEAL

JUDGMENT ON APPEAL

Pursuant to the Decision and order Affirming Administrative Revocation entered herein on December 20, 1991, Administrative Revocation is affirmed.

DATED: Honolulu, Hawaii December 20, 1991

/s/ S. Lee

Clerk of the Above-entitled Court

APPROVED:

/s/ Francis I. Yamashita

Judge of the Above-entitled Court

Appendix "C"

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
STATE OF HAWAII

JETON LEE ALLEN, Petitioner, vs.	)	AR 91-0017 Original Case No. 91-00201
IRWIN TANAKA, Administrative Director of the Courts, State of Hawaii, Respondent.	)	JUDGMENT ON APPEAL

JUDGMENT ON APPEAL

Pursuant to the Decision and order Affirming Administrative Revocation entered herein on December 20, 1991, Administrative Revocation is affirmed.

DATED: Honolulu, Hawaii December 20, 1991

/s/ S. Lee

Clerk of the Above-entitled Court

APPROVED:

/s/ Francis I. Yamashita

Judge of the Above-entitled Court

Appendix "D"

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
STATE OF HAWAII

PAUL STEWART, Petitioner, vs. IRWIN TANAKA, Administrative Director of the Courts, State of Hawaii, Respondent.	)	AR 91-0026 Original Case No. 91-00477 JUDGMENT ON APPEAL

JUDGMENT ON APPEAL

Pursuant to the Decision and order Affirming Administrative Revocation entered herein on December 20, 1991, Administrative Revocation is affirmed.

DATED: Honolulu, Hawaii December 20, 1991

/s/ S. Lee

Clerk of the Above-entitled Court

APPROVED:

/s/ Francis I. Yamashita

Judge of the Above-entitled Court

Appendix "E"

NO. 15905 & 15908

IN THE SUPREME COURT
OF
THE STATE OF HAWAII

PAUL STEWART, Petitioner-Appellant, vs. IRWIN TANAKA, Administrative Director of the Court, State of Hawaii, Respondent-Appellee.	S.C. NO. 15905 AR91-0026 Original Case No. 91-00477 APPEAL FROM THE JUDGMENT FILED DECEMBER 20, 1991 DISTRICT COURT OF THE FIRST CIRCUIT, HONOLULU DIVISION HON. FRANCIS I. YAMASHITA Judge
CHARLES D. KERNAN, Petitioner-Appellant, vs. IRWIN TANAKA, Administrative Director of the Court, State of Hawaii, Respondent-Appellee.	S.C. NO. 15908 AR91-0008 Original Case No. 91-00174 APPEAL FROM THE JUDGMENT FILED DECEMBER 20, 1991 DISTRICT COURT OF THE FIRST CIRCUIT, HONOLULU DIVISION HON. FRANCIS I. YAMASHITA Judge

OPENING BRIEF OF PETITIONERS-APPELLANTS

STATEMENT OF RELATED CASES

APPENDICES "A" THROUGH "M"

and

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NO. 15905 & 15908

IN THE SUPREME COURT
OF
THE STATE OF HAWAII

PAUL STEWART, Petitioner-Appellant, vs. IRWIN TANAKA, Administrative Director of the Court, State of Hawaii, Respondent-Appellee.	SC. NO. 15905 AR91-0026 Original Case No. 91-00477 APPEAL FROM THE JUDGMENT FILED DECEMBER 20, 1991 DISTRICT COURT OF THE FIRST CIRCUIT, HONOLULU DIVISION HON. FRANCIS I. YAMASHITA Judge
CHARLES D. KERNAN, Petitioner-Appellant, vs. IRWIN TANAKA, Administrative Director of the Court, State of Hawaii, Respondent-Appellee.	S.C. NO. 15908 AR91-0008 Original Case No. 91-00174 APPEAL FROM THE JUDGMENT FILED DECEMBER 20, 1991 DISTRICT COURT OF THE FIRST CIRCUIT, HONOLULU DIVISION HON. FRANCIS I. YAMASHITA Judge

OPENING BRIEF OF PETITIONER-APPELLANT

I.

JURISDICTION

Petitioners-Appellants CHARLES D. KERNAN and PAUL STEWART (hereinafter referred to as "Appellant Kernan" or "Appellant Stewart", if referred to individually or "Appellants", if referred to collectively) were arrested on August 9, 1991 and September 3, 1991, respectively, for driving under the influence of intoxicating liquor. The administrative revocation of Appellants' license was subsequently affirmed by the director of the Administrative Driver License Revocation Office of the Judiciary (hereinafter the "ADLRO"), on review of the revocations, the subsequent hearings held thereon, and thereafter by the Judge of the District Court, who, pursuant to Section 286-260, *H.R.S.*, conducted a Judicial Review of Appellants' administrative driver's license

revocations. Although Appellant Stewart had failed to appear at his administrative hearing, the District Court assumed jurisdiction for purpose of a judicial review of Appellant Stewart's case.

Appellants filed timely Notices of Appeal on January 17, 1992 (Appellant Kernan's Record on Appeal (hereinafter "Kernan RA") at 141-148) (Appellant Stewart's Record on Appeal (hereinafter "Steward RA") at 76-82), and the Records on Appeal for both Appellants were filed on February 26, 1992 (Kernan RA and Stewart RA at face pages).

On Monday, March 30, 1992, Appellants delivered a Motion to Consolidate their appeals and extend time for filing of same to the Clerk of this Court and on April 6, 1992, this Court granted said motion.

This appeal is brought pursuant to Section 641-1, *H.R.S.*, and Rule 3 of the *Hawaii Rules of Appellate Procedure*.

Pursuant to Sections 602-5 and 602-57, *H.R.S.*, this Court and the Intermediate Court of Appeals are vested with the jurisdictional authority to hear this appeal. Rule 44 of the *Hawaii Rules of Appellate Procedure*, which requires that the Attorney General of the State of Hawaii must be notified of any challenges to the constitutionality of a Hawaii statute, has also been complied with, as evidenced by the fact that the Office of the Attorney General of the State of Hawaii is representing the Respondent-Appellee herein.

II.

STATEMENT OF THE CASE

A. Appellant Kernan

Appellant Kernan was arrested on August 9, 1991, for driving under the influence of intoxicating liquor in violation of Section 291-4, *H.R.S.* and was, at that time and in accordance with

Section 286-255, *H.R.S.*, issued a Notice of License Revocation and a temporary (thirty (30) day) driving permit by the arresting officer (Notice Of License Revocation / Kernan RA at ___.). Appellant Kernan refused to submit to a blood alcohol analysis of his blood or breath at the time of his arrest. Pursuant to Section 286-258, *H.R.S.*, the director of the ADLRO issued a Notice of Administrative Review Decision on August 14, 1991, sustaining the revocation of Appellant Kernan's license for a period of one (1) year (Notice Of Administrative Hearing Decision dated August 14, 1991 / Kernan RA at ___.). In rendering his decision, the director did not consider the complete police report, relative to Appellant's case, as is required under Section 286-258(c)(3), *H.R.S.*, simply, because this had not been provided by the arresting officer, as is mandatory under

Section 286-257(a)(1), *H.R.S.*, and was, therefore, never made a part of the record (Record on Appeal from Administrative Driver's License Revocation Office/Kernan RA at 14-64.).

Additionally, in reaching his decision, the director considered the deficient "sworn" statement of the arresting officer; said deficiency resultant of the fact that the officer's "sworn" statement was not, in fact, sworn to, as required pursuant to Section 286-257(a)(1). *H.R.S.* (Kernan RA at ____.).

Under the auspices of Section 286-258, *H.R.S.*, Appellant Kernan filed a timely request for an administrative review of the director's decision to sustain the aforedescribed license revocation. (Kernan RA at ___.).

An administrative hearing was scheduled to take place on August 30, 1991 and was held as scheduled with Appellant

Kernan appearing in the company of his attorney.

During the course of the hearing, Appellant Kernan raised a number of constitutional issues in his defense, including the inherent due process violations which occur as a result of the deficiencies of Title XIV, Section 286, *H.R.S.*, which vests the state judiciary with the responsibility of charging, prosecuting and adjudicating the cases of drivers who are subject to that statute; Appellant Kernan also challenged the lack of any provision to make a timely representation of his constitutional defenses (Transcript of August 30, 1991 (hereinafter referred to a "Kernan TR") at 7, lines 11-25, and 8, line 1). Finally, Appellant Kernan also challenged the arresting officer's assertion that there was probable cause to believe Appellant Kernan had been drinking prior to his

arrest.

Subsequent to the administrative hearing of Appellant Kernan's case, the director of the ADLRO filed a Notice Of Administrative Hearing Decision sustaining the revocation of Appellant Kernan's license (Notice Of Administrative Hearing Decision dated September 4, 1991/Kernan RA at ___.). This decision was reached, in part, on a finding of fact that Appellant Kernan had exited his vehicle upon being stopped by the arresting officer and had displayed "physical indicia" which caused said officer to reasonably conclude that Appellant Kernan had been drinking (Findings of Facts, Conclusions of Law and Decision, dated September 4, Kernan RA at ___.).

Upon receipt of the aforedescribed decision, Appellant Kernan filed a Petition for Judicial Review of the administrative revocation of his license,

as provided for under Section 286-260, *H.R.S.*; said petition having been filed along with a Request For Transcripts and Order For Certification and Transmission Of The Record on October 3, 1991 (Kernan RA at 1-12).

Appellant Kernan was statutorily prohibited from obtaining a stay of the administrative revocation of his license, pending Judicial Review of same. Section 286-260 (a), *H.R.S.*. There is no statutory requirement limiting the time within which such a judicial review must take place.

As a direct result of the ADLRO's inability to transmit the Record on Appeal in a timely fashion, Appellant Kernan was forced to seek one (1) continuance to extend the time for the ADLRO to transmit the record to the District Court; said record having been filed in its entirety by October 22, 1991 (Kernan RA at Index,

page 3.).

On October 29, 1991 and November 12, 1991, Appellant Kernan filed his brief for the Judicial Review and a Motion to Disqualify All Judges of the District Court from conducting a Judicial Review of his case, respectively (Kernan RA at 101 and 115.). The Judicial Review of Appellant Kernan's case was heard in the District Court on November 18, 1991 (Kernan RA at 135.). This Judicial Review afforded Appellant Kernan the first opportunity to present his constitutional claims, hence, this review entailed a re-examination of the record and a "de novo" review of the constitutional issues peculiar to Appellant Kernan's case. The reviewing court denied the aforementioned motion on December 12, 1991 (Kernan RA at 130.) and affirmed the revocation of Appellant Kernan's driver's license on December 20, 1991 (Kernan RA at 135.),

despite its findings that the ADLRO hearing officer had clearly erred in its finding that Appellant Kernan had exited his vehicle, which in turn led to his conclusion that there existed probable cause for the arresting officer to believe that Appellant Kernan had been drinking (Kernan RA at 137-138.).

The administrative revocation of Appellant Kernan's license had run for one-hundred and three (103) days by the time the District Court rendered its decision.

On January 17, 1992, Appellant Kernan filed his Notice Of Appeal (Kernan RA at 141.), and the Record On Appeal was filed with the clerk of the State Supreme Court on February 26, 1992 (RA at face page.), and, on March 6, 1992, this Court granted Appellants' motions to consolidate their appeals and extend the time for the submission of this brief to April 20,

1992.

B. Appellant Stewart

Appellant Stewart was arrested on September 3, 1991, for driving under the influence of intoxicating liquor in violation of Section 291-4, *H.R.S.* and was, at that time and in accordance with Section 286-255, *H.R.S.*, issued a Notice of License Revocation, by the arresting officer, but was not issued a temporary permit because his license was under suspension due to a prior infraction (Notice Of License Revocation / Stewart RA at ___.). Pursuant to Section 286-258, *H.R.S.*, the director of the ADLRO issued a Notice of Administrative Review Decision on September 10, 1991, sustaining the revocation of Appellant Stewart's license for a period of one (1) year (Notice Of Administrative Hearing Decision dated September 10, 1991/Stewart RA at ___.). This decision entailed the utilization, by

the director of the ADLRO, of an incomplete police report and deficient "sworn" statements, as was the case in Appellant Kernan's case and as has been fully described herein, in the statement of facts relative to Appellant Kernan's appeal. (Stewart RA at ___.).

Under the auspices of Section 286-258, *H.R.S.*, Appellant Stewart filed a timely request for an administrative review of the director's decision to sustain the aforedescribed license revocation. (Stewart RA at ___.), however, he failed to appear at the hearing that was subsequently scheduled. On October 2, 1991, the ADLRO upheld the revocation of Appellant Stewart's license. (Stewart RA at ___.).

Upon receipt of the aforedescribed decision, Appellant Stewart filed a Petition for Judicial Review of the administrative revocation of his license,

as provided for under Section 286-260, *H.R.S.*; said petition having been filed along with a Request For Transmission Of The Record on November 1, 1991 (Stewart RA at 1-6) and the record having been filed on November 18, 1991 (Stewart RA at 7.).

Appellant Stewart was statutorily prohibited from obtaining a stay of the administrative revocation of his license, pending Judicial Review of same. Section 286-260(a), *H.R.S.*. There is no statutory requirement limiting the time within which such a judicial review must take place.

On November 25, 1991 and November 27, 1991, Appellant Stewart filed his brief for the Judicial Review and a Motion to Disqualify All Judges of the District Court from conducting a Judicial Review of his case, respectively (Stewart RA at 44 and 51.). The Judicial Review of Appellant Stewart's case was heard in the District Court on December 2, 1991

(Stewart RA at 71.). This Judicial Review afforded Appellant Stewart the first opportunity to present his constitutional claims, hence, this review entailed a re-examination of the record and a "de novo" review of the constitutional issues peculiar to Appellant Stewart's case. The reviewing court denied the aforementioned motion of December 12, 1991 (Stewart RA at 66.) and affirmed the revocation of Appellant Stewart's driver's license on December 20, 1991 (Stewart RA at 71.).

The administrative revocation of Appellant Stewart's license had run for one-hundred and seven (107) days by the time the District Court rendered its decision.

On January 17, 1992, Appellant Stewart filed his Notice Of Appeal (Stewart RA at 76.), and the Record On Appeal hereon was filed with the clerk of the State Supreme Court on February 26,

1992 (R at face page.) and, on March 6, 1992, this Court granted Appellants' motions to consolidate their appeals and extend the time for the submission of this brief to April 20, 1992.

III.

POINTS OF ERROR RELIED UPON

1. The director of the ADLRO was clearly erroneous in sustaining the revocation of Appellants' licenses on administrative review because the records considered by him at those times was incomplete due to the arresting officers' failure to transmit to the director a complete police report pertaining to Appellants' cases. These police report have never been made a part of the record (Kernan RA at 14-64 and Stewart RA at 7-42.). These omissions, on the part of the arresting officers, and the director's ensuant review of Appellants' revocations, in the absence of the aforementioned

police reports, represents a clear violation of the statutes governing the administrative revocation of a driver's license. Section 286-257(a)(1), *H.R.S.*, provides in relevant part that:

> (a) Whenever a person is arrested for a violation of section 291-4 and submits to a test which establishes that the arrestee's blood alcohol concentration was .10 or more, the following shall be immediately forwarded to the director:
> (1) A copy of the arrest report ...

and, the director's utilization of this report in reviewing the revocation of a driver's license is mandated under Section 286-258(c)(3), *H.R.S.*, which provides that:

> (c) In conducting the administrative review, the director shall consider:
> (3)The sworn statement of the law enforcement officials, and any other **evidence or information required by section 286-257**. (emphasis added)

2. The director of the ADLRO was clearly erroneous in considering the "sworn" statements of the arresting officers, the intoxilyzer supervisors and

the intoxilyzer operators, in reaching his decision to sustain the revocation of Appellants' licenses on administrative review because said statements were not, in fact, sworn to (Kernan RA at 14-64 and Stewart RA at 7-42.). Section 286-257(a)(1), *H.R.S.*, provides in relevant part that:

> (a) Whenever a person is arrested for a violation of section 291-4 and submits to a test which establishes that the arrestee's blood alcohol concentration was .10 or more, the following shall be immediately forwarded to the director:
> (1) A copy of the arrest report and the sworn statement of the arresting officer ...
> (2) The sworn statement of the person responsible for maintenance of the testing equipment ...
> (3) The sworn statement of the person who conducted the test stating facts which ...

and, the director's utilization of these sworn statements in reviewing the revocation of a driver's license is mandated under Section 286-258(c)(3), *H.R.S.*, which provides that:

> (c) In conducting the administrative

> review, the director shall consider: (3) **The sworn statements of the law enforcement officials**, and any other evidence or information required by section 286-257. (emphasis added)

The "sworn" statements of the aforementioned law enforcement personnel (Appendices "A" through "C") are not truly sworn to in that they require no affirmation under oath of the facts attested to and, therefore, are not subject to any penalties for perjury.

3. The District Court clearly erred in denying Appellant's Motion To Disqualify All Judges Of The Judiciary, State Of Hawaii, which were identical (Kernan RA at 130-134 and Stewart RA at 66-70.):

> (a) Impersonal prejudice resulting from a judge's background, association or experience is not prejudice within the meaning of the statue [601-7(b), H.R.S.]

(Kernan RA at 131 and Stewart at 67, lines 25-27.).

> (b) Thus, any allegation of

bias or prejudice against any undetermined future judge is too speculative and remote to contemplate such an extreme step as a disqualification en masse of all judges of the state.

(Kernan RA at 132 and Stewart RA at 68, lines 13-16.).

(c) Clearly, in this case the ADLRO is functioning within a judicial capacity in serving as an interpreter of the law.

(Kernan RA at 133 and Stewart RA at 69, lines 13-14.).

(d) Furthermore, Petitioner mischaracterizes the role of the hearings officer when he states that he acts as prosecutor and judge. The hearings office, as in any administrative hearing, is an impartial adjudicator reviewing the decisions made by a lower level administrative review officer.

(Kernan RA at 133 and Stewart RA at 69, lines 21-25.).

An individual's driving privileges, once vested, and the interests collateral thereto, are protected interests of which

an individual may not be deprived without due process of law. Due Process requires, in part, the adjudication of questions of law and disputes of fact, which have arisen out of a state action, by a neutral and detached magistrate. There can be no presumption of neutrality, on the part of judges, when the judiciary assumes the roles of charging party, prosecution and adjudicator, hence, the construction of Section 286 et seq., *H.R.S.*, by placing the ADLRO within the purview of the Judiciary represents a manifest violation of Due Process rights and is, as a result, unconstitutional on its face and as applied.

> (e) Petitioner himself has stated in his motion that individual judges who have heard ADLRO cases have not been influenced, prejudiced, or biased because the ADLRO is placed for administrative purposes within the Judiciary. Memorandum at 3.

(Kernan RA at 132 and Stewart RA at 68,

lines 4-7.).

Appellants had made no such statements in their motions.

4. The District Court clearly erred in its failure to overturn the revocation of Appellants' licenses, on the basis of the constitutional arguments raised by Appellants on Judicial Review of their cases, due to its clearly erroneous findings of fact and conclusions of law (Kernan RA at 135-138 and Stewart RA at 71-73.):

> (a) The Petitioner has raised certain constitutional issues concerning separation of power and lack of due process. These issues are identical to the constitutional issues raised by Mr. Poelman in CHOCK v. TANAKA, AR 91-0003 (December 20, 1991). The Chock decision would control the disposition of the constitutional issues in the present case.

(Kernan RA at 135 and Stewart at 71, lines 7-12/ **Chock v. Tanaka** is attached hereto as Appendix "D".).

> (b) It is improper for the

Petitioner to claim certain due process protections when there was no evidentiary hearing in the present case.

(Stewart RA at 72, lines 1-3.).

(c) The Petitioner has raised some issues concerning the issuance and service of subpoenas for the Administrative Hearing. This Court's decision in CHING v. TANAKA, AR 91-0004 (November 6, 1991) is dispositive of most of such issues raised in the present case.

(Kernan RA at 136, lines 7-11/ **Ching v. Tanaka** is attached hereto as Appendix "E".). Section 286 et seq., *H.R.S.*, is unconstitutional on its face and as applied because it denied Appellant, and others similarly situated, Due Process of law prior to the deprivation, by the State, of constitutionally protected interests. A driver's license, once issued to a licensee, is a constitutionally protected interest, the deprivation of which may not be undertaken

by the state without Due Process. **Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 90 (1971); Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979); Dixon v. Love, 431 U.S. 105, 112, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); Thomas v. Fiedler, 884 F.2d 990 (7th Cir. 1989).**

5. The District Court clearly erred in its determination that the error committed by the hearing officer, in finding that Appellant Kernan had voluntarily left his vehicle without instructions from the police officers who had stopped him, was harmless:

> (a) The Petitioner is correct in his contention that the Hearings Officer erred in making that finding...
>
> The constitutional doctrine of the exclusionary rule which is articulated in State v. Kim, 68 Haw. 286 (1985) applies only to criminal cases. A H.R.S. Chapter 286 administrative revocation is a civil action to which the

> exclusionary rule does not apply. Generally, see State v. Severino, 56 Haw. 378 (1975). Since the exclusionary rule does not apply to the present case, an erroneous ruling by the Hearing Officer concerning that issue is harmless error.

(Kernan RA at 138.).

Section 286-259(e)(2), *H.R.S.*, provides in pertinent part that the director may affirm an administrative revocation, only if, along with other criteria, it can be determined that there existed probable cause to believe that the arrestee drove, operated or was in physical control of the motor vehicle while under the influence of intoxicating liquor. The aforedescribed erroneous finding of the Hearings Officer, acknowledged by the District Court, represented the foundation for the requisite finding of probable cause. Absent said error there could have been no finding that there existed probable cause, hence, contrary to the District Court's

holding, the error committed by the Hearings Officer was prejudicial to Appellant Kernan's case and the revocation of his license should have been reversed by the District Court.

IV.

STANDARD OF REVIEW

The issue of whether the revocation of a driver's license should have been administratively sustained absent a complete record in reviewable under the abuse of discretion standard, however, a reversal is not mandated unless it is found that the ADLRO exceeded the bounds of reason or disregarded rules of principle of law or practice. **State v. Rabe, 5 Haw. App. , 687 P.2d 554 (1981).**

Where the admission of evidence, or the failure to do so, arguably involves a question of law, the Court may utilize a right/wrong standard of review. **State v. Miller, 4 Haw. App. 603, 671 P.2d 1037**

(1983).

Issues relating to Findings of Fact are reviewable under the clearly erroneous standard. State v. Patterson, 58 Haw. 462, 571 P.2d 745 (1977).

A finding of fact is clearly erroneous when, although there is substantial evidence to support it, the reviewing Court, on the basis of the entire evidence, is left with the definite and firm conviction that a mistake has been committed. Kim v. State, 62 Haw. 483, 616 P.2d 1376 (1980).

Conclusions of law are reviewable on a "de novo" basis. *See generally*, State v. Miller, Id., United States v. McConney, 728 F.2d 1195 (9th Cir. 1984).

V.

STATEMENT OF THE QUESTIONS PRESENTED

A. WHETHER THE DIRECTOR OF THE ADLRO SHOULD HAVE UPHELD THE REVOCATION OF APPELLANTS' DRIVER'S LICENSE IN THE ABSENCE OF THE ENTIRE POLICE REPORT?

B. **WHETHER THE CONSTRUCTION AND APPLICATION OF SECTION 286 ET SEQ., *H.R.S.*, REPRESENTS A VIOLATION OF APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS?**

C. **WHETHER THE DISTRICT COURT SHOULD HAVE REVERSED THE REVOCATION OF APPELLANT KERNAN'S LICENSE DUE TO THE CLEARLY ERRONEOUS FINDING OF THE HEARINGS OFFICER RELATIVE TO THE ISSUE OF PROBABLE CAUSE?**

VI.

ARGUMENT

A. **THE DIRECTOR OF THE ADLRO SHOULD NOT HAVE UPHELD THE REVOCATION OF APPELLANTS' DRIVER'S LICENSES IN THE ABSENCE OF THE ENTIRE POLICE REPORT BECAUSE TO DO SO WAS IN VIOLATION OF SECTIONS 286-257(a)(1) and 286-258(c)(3), *H.R.S.***

It is a statutory requirement that the complete arrest report, relating to the arrest of a driver whose license has been administratively revoked by a police officer, must be transmitted to the director of the ADLRO (Section 286-257(a)(1), *H.R.S.*), and that this report must be considered by the director during

the course of his determination whether to sustain or rescind the revocation of a driver's license. Section 286-258(c)(3), *H.R.S.*.

Although a licensee may inspect and copy "all documents considered at the review [of an administrative revocation], including the arrest report" (Section 286-258(f), *H.R.S.*.), the onus is not on the licensee to ensure that said report is made a part of the record, instead, this report must be included in the record before the licensee is given access to same and must, in fact, be a part of the initial record prior to the sole review of an administrative revocation which is automatically conducted by the director of the ADLRO. Sections 286-257(a)(1) and 286-258(c)(3), *H.R.S.*.

Furthermore, the "report" contemplated by the legislature is not the cursory "OBTS" report, included in the

record hereon (RA at 10-42.), which contains very little information relative to the circumstances of the arrest or substantive offense. Instead, inasmuch as this report is to be utilized by the director of the ADLRO in arriving at a decision on the basis of all of the facts and circumstances surrounding an alleged offense, it is clear that the legislature intended that the entire police report be made a part of the record, pursuant to the aforecited statutes. The "OBTS" report, which is the sole report included in the initial and subsequent record in the case at bar, is merely a part of the entire police report which is required.

The facts that the "OBTS" report is insufficient and that the entire police report must be made a part of the initial record, prior to the director's review of a licensee's administrative revocation, are buttressed by a number of opinions

delivered by the District Court, which, on judicial review of a number of cases which are on point relative to these two (2) issues, reversed the administrative revocations therein. (See Appendices "F" through "I").

However, one judge of the District Court has ruled that although the entire police report must be made a part of the record, the failure of the police to transmit the entire report to the director prior to his administrative review of a revocation can be overcome if a licensee requests that report at the subsequent administrative hearing; in so ruling, that judge held that "...after all, [that] is the reason for having the hearing in the first place." (See Appendix "J").

This logic, in essence, offers the director of the ADLRO "carte blanche" license to ignore, as a matter of practice, the statutory requirements which

govern the administrative review of a license revocation on the grounds that these laws can subsequently be complied with on appeal at the administrative hearing. Following this line of reasoning, then, there is no compulsion for the Hearings Officer to comply with the statutory requirements for an administrative hearing or for a District Court judge to comply with the law in his conduct of a judicial review, or any other type of adjudication, simply because the practice of ignoring the law in an adjudicatory proceeding may be rectified at some later appellate proceeding. This holding is nothing less than a blatant abuse of discretion and represents an affront to the principles of Due Process, which were designed specifically to forestall the abuse of state's power, as exemplified by the aforedescribed ruling of the District Court.

The fact of the matter is that Sections 286-257(a)(1), and 286-258(c)(3), *H.R.S.*, demand specific acts and considerations, on the part of the police department and the director of the ADLRO. The failure to comply with these statutory requirements, as in the instant cases, mandates a reversal of Appellants' revocations because these should never have been sustained by the director of the ADLRO in the absence of the complete police report.

B. **SECTION 286 ET SEQ., *H.R.S.*, REPRESENTS A VIOLATION OF APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED**

1. The Deprivation of an Individual's Driver's License, Pursuant to Section 286 et seq., H.R.S., Implicates Constituionally Protected Interests

Individuals facing administrative revocation of their driving privileges, pursuant to Section 286 et seq., *H.R.S.*,

are not afforded the opportunity to have their Constitutional defenses addressed prior to the revocation of their driver's license. Nor are they permitted to seek a stay of their license revocations pending the initial adjudication of the aforementioned constitutional questions on Judicial Review. In fact, the issuance of a stay, pending Judicial Review of an administrative license revocation, is statutorily prohibited pursuant to Section 286-260, *H.R.S.*, which provides in pertinent part that:

> **The filing of the petition [for judicial review] shall not operate as a stay of the administrative revocation nor shall the court stay the administrative revocation pending the outcome of the judicial review.**

The State's deprivation of an individual's driver's license, combined with the aforecited statutory prohibition against the issuance of a stay of the revocations, prior to any meaningful hearing of the individual's constitutional

defenses constitutes a manifest violation of due process rights under both the Constitutions of the State of Hawaii and the United States. Both the Fourteenth Amendment to the *United States Constitution* and Article I, Section 5, of the *Hawaii State Constitution* prohibit the state's deprivation of an individual's constitutionally protected interests without due process of law.

The determination as to whether or not an individual has been denied due process of law, in violation of the aforementioned constitutional provisions, is predicated on a two-part determination. First, it must be established whether said deprivation effects a constitutionally protected interest; then, if that interest is so protected, it must be determined what form of process is required prior to the state's deprivation of the individual's interest. **Mackey v. Montrym**,

443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).

A. An Individual's Driving Privilege, Once Conferred, is a Constitutionally Protected Interest.

A driver's license, once issued, is a constitutionally protected interest which may not be revoked or suspended without due process of law. **Mackey v. Montrym, supra**. The aforecited case is of particular interest in that the Court took great pains to re-emphasize this position, despite the fact that it had ruled, in that case, against the defendant therein. The defendant's license had been suspended pursuant to his refusal to submit to blood alcohol testing. Defendant's license in that case had been suspended prior to his ability to present his case within the context of a meaningful hearing; however, said hearing was held immediately after said suspension. **Id**.

The **Mackey** case differs

substantially, however, from the instant cases in that the suspension arose solely as a result of the defendant's refusal to submit to blood alcohol testing. Implied consent to submit to blood alcohol testing upon request attaches as a condition under which a license is issued to an individual by the state; thus, implied consent becomes akin to a contractual caveat which has been agreed to by the licensee. However, as the **Mackey** Court pointed out, this ruling was not meant to undermine previous holdings that a driver's license, once conferred, is a substantive interest which cannot be revoked or suspended without due process of law.

In short, if the defendant in **Mackey v. Montrym** had submitted to blood alcohol testing and been found to have a blood alcohol reading about the legal limit, his license could not have been suspended prior to the state's having held a

meaningful hearing thereon, a position which is consistent with other rulings relative hereto. **Mackey v. Montrym, supra; Dixon v. Love, 431 U.S. 105, 112, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 90 (1971).**

"Suspension of issued licenses involves state action that adjudicates important issues of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." **Bell v. Burson, 402 U.S. at 539;** *See also,* **Dixon v. Love, 431 U.S. at 112.**

The U.S. Supreme Court has determined that property interests are often varied and may be intangible. **Logan v. Zimmerman Brush Company, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).** These rights relate to the *"domain of social and*

economic fact." Id. at 430 (citing National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting)). *"Property interests...are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...that secure certain benefits and that support claims of entitlement to these benefits."* Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Clearly then, a driver's license, once conferred, becomes a property interest of the licensee and as such, cannot be seized without due process of law.

B. The Constitutional Protections of Due Process Extend to Reputational Interests.

The constitutional protections offered under the aegis of due process also apply in those instances where an individual's reputational interests are put at risk by the state's actions. **Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).** Such reputational interests having been defined as the honor, good name, integrity or reputation of an individual who, on being charged, may suffer an impairment of his standing and association in the community. **Ibid.; Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701,** 33 L.Ed.2d 548 (1972). In **Board of Regents**, the Supreme Court held that a reputational interest is an element of the "liberties" concept embodied in the Fourteenth Amendment and is, therefore, a protected interest. **Board of Regents v. Roth, supra.** Interference with one's liberty invokes the protections of Due Process. **Id.**

The U.S. Supreme Court ruled that the presence of a ten day expulsion on a high school student's school records could be of such detriment so as to affect the student's reputation even to the extent that his future possibilities for higher education and employment would be affected adversely thus, the accused in that case had to be afforded the right to Due Process in order to protect the liberty interest in his reputation; a set of circumstances far more tenuous than those surrounding a DUI conviction. **Goss v. Lopez, 419 U.S. 565, 576, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).** The Goss Court determined that: "[i]t is apparent that the claimed right of the state to determine unilaterally and without process whether that misconduct has occurred immediately collides with the [due process] requirements of the Constitution. **Id. at 575.** The serious ramifications of

a drunk driving charge on an individual's reputational interests and the conjunctive rights to due process have also been recognized by this Court, which, in upholding the right to jury trials for individuals so charged, held that:

> **On an individual level, in turn, these [drunk driving] punishments can involve a disruption of daily life, interruption of livelihood and disaffection from other members of the community which cannot be viewed as minor.**

State v. O'Brien, 68 Haw. 38, 44, 704 P.2d 883, aff'g. State v. O'Brien, 5 Haw. App. 491, 704 P.2d 905 (1985). In further emphasizing its position hereon, the O'Brien Court adopted the language of the Ninth Circuit Court, which reads in relevant part as follows:

> **[T]he loss of a license as important as a driver's license, a deprivation added to penal sanctions, is ...[a] sign that the DUI defendant's community does not view DUI as a petty offense.**

Ibid. at 44, citing United States v. Craner, 652 P.2d 23, 26 (9th Cir. 1981).

The seriousness with which the community views a DUI charge is exemplified by the fact that Hawaii's Administrative Driver License Revocation statute was passed by the legislature during a special session that was held as a direct result of lobbying efforts by M.A.D.D. (See Appendix "K"). In Hawaii, the stigma affixed to the administrative revocation of one's license can, and does, affect one's employability and carries with it far reaching collateral consequences, including, but not limited to, a substantial increase in insurance premiums. (See Appendix "L")

The Fifth Circuit Court of Appeals addressed these collateral consequences when it concluded that a violation of drinking/driving statutes was sufficiently serious to merit a jury trial prior to any determination of guilt, noting, that this was necessary due to the public opinion

that surrounded charges of this nature and the ramifications of ensuant insurance premiums increases. **Landry v. Hoepfner, 818 F.2d 1169 (5th Cir. 1987).**

The property interest in one's driver' license and the liberty interest in one's reputation entitle the accused, in this context, to the fullest measure of Due Process. Having established this, it must be determined what process is due to protect against a wrongful deprivation of these interests.

2. Due Process Requires a Hearing at a Meaningful Time and in a Meaningful Manner.

Simply put, Due Process requires an opportunity to be heard at a meaningful time and in a meaningful manner. **Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); Barry v. Barchi, 443 U.S. 55, 66, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).** Procedurally, the constitutional guarantee

of Due Process has been interpreted to require not only a meaningful opportunity to be heard before the state acts to deprive an individual of his property, but that said hearing be held within a meaningful time. *See* **Mullane v. Central Hanover Trust Company, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950); Goldberg v. Kelley, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Fuentes v. Shevin, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).** The underlying principle being, of course, that an individual threatened with the loss of a property interest should have the opportunity to challenge that loss at a hearing before a neutral decision maker "at a time when the deprivation can still be prevented." **Fuentes v. Shevin, 407 U.S. 67 at 81-82 (1972).** *See also,* **Joint Anti-Fascist**

Refugee Committee v. Mcgrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

Locally, this Court has also maintained that a hearing, conducted in a meaningful manner and held at a meaningful time, must precede any governmental deprivation of constitutionally protected interests. Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989); Klinger v. Kepano, 64 Haw. 4, 635 P.2d 938 (1981).

The reputational interests which attach to a drive's license do not abate on the basis of whether or not the penalties contemplated are minimal, instead, it is the severity of the charge, in and of itself, which determines the extent of Due Process and other federal

protections which are warranted. **State of Hawaii v. Jordan et al, ___ Haw. ___, ___P.2d___, (February 13, 1992).**

There is no dispute that the charge of DUI is a serious charge; this is evidenced by the fact that the penalty sought is the deprivation of the violator's license and that a conviction will result in a substantial increase in insurance premiums for the driver. **Id.; State v. O'Brien, supra.** If, then, the offense of DUI is deemed a serious crime, it seems incongruous to assume that the severity of the offense varies by virtue of the method that is employed to deal with the problem. Hence, the administrative deprivation of a driver's license does not diminish the severity of the offense vis a vis a deprivation that is undertaken through criminal proceedings. In fact, the severity of a DUI offense is perhaps magnified due to

the fact that an arrestee must now face two (2) separate and unrelated proceedings stemming from the same incident.

A. To be Within a Meaningful Time A Meaningful Hearing Must be Held Prior to a Deprivation or a Stay of the Deprivation Pending a Meaningful Hearing is Required.

(i) The lack of a predeprivation meaningful hearing or immediate judicial review denies due process.

Under Hawaii's administrative driver's license revocation scheme, a licensee is issued a temporary permit which is in effect for thirty (30) days from the time of arrest. Section 286 et seq., *H.R.S.*. Upon the expiration of said temporary permit, and if the revocation of the license is upheld as the result of an administrative revocation hearing, the licensee's suspension becomes effective for a period of three (3) months. The construction of the statutes allow for the

entire administrative revocation process, save a post deprivation hearing, to be completed within the time period allotted for the temporary permit. The post deprivation hearing or Judicial Review, is extraneous to this time frame. Section 286 et seq., *H.R.S.*.

Although a licensee may apply for an occupational license at the time of the administrative revocation hearing, there are no statutory provisions for application for a chauffeur's or other special license in the event that the suspension is confirmed at said hearing.

It is the lack of any statutory provision for the timeliness of a post deprivation hearing which distinguishes these cases from two significant cases in which the United States Supreme Court reviewed administrative revocations. **In Mackey v. Montrym, supra.**, a review of the administrative suspension was immediately

available to the licensee whose license had been revoked, while in **Dixon v. Love**, **supra.**, judicial review was mandated to take place within twenty (20) days of a request by the affected licensee. The necessity for prompt post-deprivation review was emphasized by the **Mackey** Court, which held:

> **[w]hen prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the pre-deprivation procedures use the design to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be.**

Mackey at 13.

The determination on the necessity of a pre-deprivation hearing is dependant on the "*extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter.*" **Dixon, 431 U.S. at 112.** The controlling factor, utilized by

the **Dixon** Court in its determination that something less than an evidentiary hearing was sufficient in that case, prior to adverse administrative action, was that the risk of an erroneous deprivation in the absence of a prior hearing was not great, based on the circumstances. **Mackey, 443 U.S. at 12 and Dixon, 431 U.S. at 113.** In **Dixon**, the Illinois Secretary of State was authorized to suspend a driver's license without a hearing, simply upon a showing by his record that the driver's conduct falls into one of eighteen (18) categories, one of which was a history of recividism relative to violations of traffic laws. The **Dixon** Court determined an unlikelihood of erroneous suspension because, the suspension of a license, under the Secretary's regulations, was largely automatic; involving only a determination of whether the number of traffic

convictions attributable to a particular driver equalled or surpassed the statutorily proscribed number of convictions which would warrant a license revocation. Id., 431 U.S. at 113. Thus, absent a counting error by the Secretary, no other potential for an erroneous deprivation existed, save a clerical error. Id. Such error could easily be remedied without an evidentiary hearing. Id.

As has been expounded on earlier herein, the underlying circumstances in Mackey related directly to a refusal to submit to blood alcohol level testing and provided for a hearing immediately after the suspension of the licensee's operating privileges. Mackey v. Montrym, supra.

The instant case is markedly different from Dixon and Mackey. In order to meet the requirements of Due Process, Hawaii's Administrative Driver License

Revocation scheme must not only provide a pre-deprivation hearing, but must provide an evidentiary hearing prior to, or immediately after, the suspension of a licensee's driving privileges. This is due to the fact that Hawaii's new administrative revocation statute requires a determination by a hearing officer of facts and legally complex issues, virtually all of which require a weighing of evidence and a process of fact finding.

An administrative review of the license revocation, issued by the arresting officer, entails consideration, by the director of the ADLRO, of (1) Any sworn or unsworn statement or other evidence provided by the arrestee; (2) The breath or blood test results, if any; and (3) The sworn statements of the law enforcement officials, and other evidence or information required by section 286-257. Section 286-258, *H.R.S.*.

Section 286-257, H.R.S., provides that the findings of fact and conclusions of law reached must include a determination whether there was reasonable suspicion to stop, probable cause to believe the arrestee had been driving while intoxicated,e arrestee was informed of the sanctions which could be brought, both administratively and criminally, whether the arrestee's blood alcohol content level as .10 per cent or more, if pertinent, whether the intoxilyzer had been properly calibrated and was functioning properly and a number of other determinations of fact. These issues must also be considered at the time of the administrative hearing, should, as is the case herein, such a hearing be requested by the arrestee in the event the director of the ADLRO has confirmed the revocation.

Not considered at any review or hearing conducted on the administrative

level by the ADLRO are constitutional defenses; these are considered on a "de novo" basis by the District Court on judicial review of an administrative revocation. **HOH Corp. v. Motor Vehicle Licensing Board, 69 Haw. 135, 736 P.2d 1271 (1987).** Judicial reviews are post-deprivation hearings which are not required to be held within a specific period of time after a decision has been rendered by the director of the ADLRO on completion of the aforementioned administrative hearing. Section 286-260, *H.R.S.*.

In the cases at hand, the judicial review decision affirming Appellants' administrative license revocation were both filed on December 20, 1991. (Kernan RA at 135, Stewart RA at 71.). In net result, the decisions of the District Court were not rendered moot, in Appellants' cases, due to the fact that

Appellants' licenses had both been revoked for a period of one (1) year, however, had these been normal ninety (90) day revocations, the District Court's decisions would have been moot; the decision in Appellant Kernan's case having been rendered one-hundred and three (103) days after the effective date of his revocation and the decision in Appellant Stewart's case having been filed one-hundred and seven (107) days after the effective date of his license revocation. In the case of Appellant Kernan, the Judicial Review Decision was filed one-hundred and seven (107) days after the decision filed by the director of the ADLRO after the administrative hearing of Appellant Kernan's case (Kernan RA at 14-64 and 141.). The Judicial Review decision in Appellant Stewart's case was file seventy-nine (79) days after the filing of the administrative hearing

decision relative to his case. (Steward RA at 7-42 and 71.).

The delay between the time a decision is rendered by the director of the ADLRO, pursuant to an administrative hearing, and the time a judicial review of the administrative revocation of a driver's license is held, and a decision therefrom filed, is not peculiar to Appellants' cases; instead, this is the norm rather than the exception. Counsel for Appellants are aware of a number of cases in which the judicial reviews of drivers' cases have been rendered nearly or absolutely moot through the passage of time; in some cases the decisions were favorable to the petitioners' for such reviews, and in others they were not. Examples of twenty-nine (29) such cases, which have been handled by Appellant's attorneys, are attached hereto in the form of copies of counsels' logs for each such

case, taken from their offices. (See Appendices "M-1" through "M-29").

In practical terms, neither Appellants nor the aforementioned twenty-nine (29) individuals were afforded the opportunity to raise their constitutional defenses within a meaningful time. This failure to provide a timely means of allowing a licensee to obtain a hearing of his constitutional defenses represents a violation of the federal constitutionally mandated right to Due Process because it deprives him of the required "full and fair opportunity to litigate [his] constitutional claims." **Thomas v. Fiedler, 884 F.2d 990 (7th Cir. 1989); Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986).**

(ii) The absence of a stay pending a meaningful hearing denies due process.

An individual aggrieved by the final

determination of the Administrative Driver License Revocation Office of the Judiciary may petition for Judicial Review of that determination by the District Court of the Judiciary.

Judicial Review is meant to entail an evidentiary review of the issues addressed by the administrative hearing officer and a "de novo" examination of a licensee's constitutional defenses; an eventual post-deprivation meaningful hearing. Section 286-260(b), *H.R.S.* However, a stay of the administrative suspension, pending said review, is statutorily prohibited. Section 286-260, *H.R.S.* Furthermore, there is no statutory requirement specifying the time within which the Judicial Review must be held.

Absent a review within a meaningful period of time and the conjunctive risk of irreparable harm resultant of a deprivation of a constitutionally

protected interest, it has been made a condition in such cases that there be a stay pending the reviewing court's final decision. **Porter v. Investors Syndicate, 286 US 461, 76 L Ed 1226, 52 S Ct 617, affd 287 US 346, 77 L Ed 354, 53 S Ct 132 (1932).**

In **Gillaspie v. Department of Public Safety, 152 Tex 459, 259 SW 2d 177, cert den 347 US 933, 98 L Ed 1084, 74 S Ct 625 (1954),** the Supreme Court held that due process was ensured by a provision for judicial review and "further assured" by a provision for stay until final decision.

The issuance of a stay, during the interim period between the time of a deprivation and the time of a meaningful hearing, is mandated in order to offset the risk of an erroneous deprivation of an accused's protected interests which cannot be made whole through a post-deprivation review of that deprivation; a driver's

license and the interests collateral thereto are such protected interests and cannot be made whole in the event of an erroneous deprivation. **Mackey v. Montrym, supra.; Dixon v. Love, supra.; Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).**

The prohibition against a stay relative to these proceedings is peculiar to this aspect of Hawaii law. Section 641-3, *H.R.S.*, provides for a stay of proceedings to enforce a judgement resultant of civil actions. Hawaii's criminal statutes provides for a stay of execution of sentence in the event a defendant offers notice of his intention to appeal. Section 641-14, *H.R.S.*

Perhaps even more significant is the provision for a stay, under certain conditions, found in Hawaii's Administrative Procedures statutes; one of these conditions being predicated on the

possibility that irreparable damage may be done to the subject individual if a stay is not ordered. Section 91-14(c), *H.R.S.*

The U.S. Supreme Court has offered ample determinations that the statutory prohibition of a stay, pending judicial review of an administratively invoked deprivation of constitutionally protected interests, represents a manifest violation of the subject parties' Due Process rights. **Porter v. Investors Syndicate, supra; Anderson National Bank v. Lucket, 321 U.S. 223, 64 S.Ct. 599, 88 L.Ed. 692 (1944).**

Barring any requirement that a Judicial Review, a meaningful hearing, be conducted immediately, or within a specified time, after the administrative revocation, it is imperative that an individual aggrieved of an administrative suspension decision, upon petitioning for Judicial Review, be granted to stay of the

administrative suspension determination. Otherwise, there is absolutely no incentive for the State to ensure an expeditious Judicial Review of the aggrieved licensee's case and, there is an inherent risk that it will delay, either deliberately or through bureaucratic indifference, the Judicial Review hearing until the administrative revocation has run its course (three (3) months) for first offenders, thus rendering the issues to be moot and the need for Judicial Review to evaporate, as has occurred in the case at bar.

Moreover, the delays in obtaining a judicial review have a domino effect on the expeditiousness of seeking an appellate review of the District Court's decision. In the cases at bar, a favorable ruling by this Court will not negate an erroneous deprivation of Appellant's constitutionally protected

interests, because he cannot be made whole for that which has been taken.

This is not to suggest that Appellants have a right to a stay of their revocations pending this appeal, but instead, this point is meant to exemplify the need for either a finite requirement within which a judicial review must be held, if requested, or a stay pending such review in the absence of a timeliness requirement.

B. To be a Meaningful Hearing, a Hearing Under Section 286 et seq., H.R.S., Must Satisfy Due Process Requirements.

In Mathews v. Eldridge, the United States Supreme Court recognized that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Mathews, 424 U.S. at 334 (quoting from Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886,

895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." Morissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Thus, in order to ascertain whether or not the administrative revocation procedures herein are constitutionally deficient, an analysis of the affected governmental and private interests in required. Mathews, 424 U.S. at 334.

"The dimensions of a prior hearing may, of course, vary depending upon the nature of the case, the interests affected, and the prompt availability of adequate post-deprivation procedures. Boddie v. Connecticut, 401 U.S. 371; Matthews v. Eldridge, 424 U.S. 319, 334-334." Mackey, 443 U.S. at 21 (Stewart, J., dissenting).

(i) The construction of Section 286 et seq.,

H.R.S., puts the state judiciary in the position of both prosecutor and adjudicator thus violating due process.

Section 286 et seq., *H.R.S.*, provides that the administration of Hawaii's Administrative Driver License Revocation Act falls solely within the purview of the Judiciary. This places the Judiciary in the untenable position of initiating administrative driver's license revocation proceedings against an individual, prosecuting the case, and adjudicating the Judicial Review, if one is petitioned for by the individual charged, of the entire preceding revocation process. Ultimately, in the event of a revocation being confirmed on Judicial Review, the individual may appeal to the State Supreme Court, however, inasmuch as the normal duration of a revocation is three (3) months, the issue ha by this time generally been rendered moot.

The entire administrative revocation procedure is overseen by attorneys in the employ of the Judiciary. Judicial Review of these matters is conducted by a District Court judge, in the presence of a petitioner and/or his attorney. The state is unrepresented during the course of the administrative hearing and the judicial review, save by the sitting hearing's officer or judge, who by virtue of representing the Judiciary is a party to the proceeding. As a result, a hearing's officer conducting an administrative revocation hearing fulfills the role of prosecutor and judge as does the reviewing judge conducting a judicial review of such cases.

Canon 3 (C)(1)(b) of the *Hawaii Code of Judicial Conduct,* in prescribing the standard of conduct for state judges, charges that "...*a judge should disqualify himself in a proceeding in which his*

impartiality might reasonably be questioned, including instances where: he served as a lawyer in the matter in controversy, or as a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such a lawyer has been a material witness concerning it;". Clearly, in the matter at hand, the adjudicating District Court judges cannot by any stretch of the imagination be perceived as being impartial; surely the interests of the Judiciary in prosecuting these cases on the administrative level represents a risk that those interest will contribute to an erosion of neutrality on Judicial Review.

The standard of conduct promulgated by the canons of judicial conduct was sanctified by the State Supreme Court, which, in addressing this issue, adopted the language ad interpretation of **In re**

Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955), citing therefrom that *"Fairness of course requires an absence of actual bias in the trial of cases."* and that *"...our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can judge in his own case and no man is permitted to try cases whether he has an interest in the outcome."* **State v. Brown**, 70 Haw. 459, 465-467, 776 P.2d 1182 (1989).

Further exploring this issue in **State v. Brown**, the Court called upon the relevance thereto, of the United States Supreme Court's ruling in **Tumey v. Ohio**, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927), citing, in pertinent part that *"[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or*

which might lead him not to hold the balance nice, clear and true between the Stat and the accused, denies the latter due process of law." (emphasis added), **State v. Brown, supra.** Clearly, in order to avoid a violation of Due Process rights, the prosecuting body, in this instance, the Judiciary, cannot be called upon to hold the balance between the interests of the State and those of an accused. Particularly, insofar as the Judiciary also finds itself in the role of State's advocate.

Although the State Supreme Court acknowledged that its ruling could serve to nullify the possibility of adjudication by a fair and impartial judge who would do his utmost to balance the scales between **contending parties** (emphasis added), in the interest of achieving justice, it determined in **State v. Brown** citing from **Offut v. United States, 348 U.S. 11, 14,**

75 S.Ct. 11, 99 L.Ed. 11 (1954), that *"justice must satisfy the appearance of justice.". See also:* **Sussel v. City and County of Honolulu, 71 Haw. 109 (1989).** The circumstances presented in the instant cases do not require that judges maintain their neutrality in weighing the scales between two opposing parties, instead it is expected that a judge sitting in review of these matters will maintain their impartiality, despite the fact that they are, in effect, one of the parties. This is substantively different from normal appellate procedure, where other members of the Judiciary may be called upon to review the interpretations of law by a lower court judge; the fundamental difference being, that the Judiciary is normally not a party to a proceeding, unless for the purpose of enforcing its own rules.

Most certainly, the provisions of

Section 286 et seq., *H.R.S.*, present a precedent inasmuch as it formulates the only instance, under Hawaii law, in which an action which is aimed at depriving an individual of constitutionally protected interests is initiated against the individual, by the Judiciary, where such action does not arise out of another proceeding already in the hands of the Judiciary.

Despite the fact that this is a civil proceeding, a licensee's rights are not diminished. The *Fourteenth Amendment* to the *United State Constitution* mandates that no State may abridge the privileges of U.S. citizens without due process of law. The test as to whether a judge is impartial or not is not predicated on the need to ascertain this in fact, but rather, is contingent on an whether one might reasonably question a judge's impartiality on the basis of all the

circumstances. Yorita v. Okumoto, 3 Haw. App. 148, 643 P.2d 820 (1982).

The problem presented under the circumstances herein arises from the fact that *Section 286 et seq., H.R.S.*, in shifting the onus of prosecuting administrative drivers' license revocation proceedings to the Judiciary, reduces the constitutionally guaranteed right to Due Process to a gamble that such rights will be respected by an individual judge rather than ensured by the administrative revocation process in toto; a predicament which is unacceptable.

The manifest problems in seeking Judicial Review of administratively revoked driver's license, as afore-illustrated, are resultant of the inherent deficiencies of Section 286 et seq., *H.R.S.*, which charges the Judiciary with the administration and oversight of the administrative driver license revocation

process; a function which, in the interests of preserving the interests of constitutional Due Process and a Fair and Impartial hearing, properly belongs within the realm of the executive branch of government.

The United States Constitution does not empower the federal government to determine the allocation of power, by the individual States, to their respective branches of government. **Highland Farms Dairy v. Agnew, 300 U.S. 608, 81 L.Ed. 835, 57 S.Ct. 549.** However, any such delegation of power must be consistent with the tenets of due process. **Crowell v. Benson, 285 U.S. 22, 76 L.Ed. 598, 52 S.Ct. 285. (Cited from Section 215, 16 Am., Jur. 2d.458)**

Of equal importance is the fact that the *Constitution of the State of Hawaii* delineates the allocation of power on much the same lines as does the federal

constitution; the Legislature is charged with the enactment of law, *Article II, Section 1, Hawaii State Constitution*, the Executive branch is charged with the execution of law, *Article V, Section 5, Hawaii State Constitution*, and the Judiciary is charged with the State's judicial power, *Article VI, Section 1, Hawaii State Constitution*. **Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446, 484 U.S. 898, 98 L.Ed.2d. 192, 108 S.Ct. 234 (1987).**

In pertinent part, *Black's Law Dictionary* defines the term "Executive" as follows:

> *"As distinguished from the legislative and judicial departments of government, the executive department is charged with the detail of carrying the laws into effect and securing their due observance."*
> **Black's Law Dictionary, Revised Fourth Edition, Black, Henry Campbell, West Publishing Co. (1968), page 678.**

while the term "Judicial Power" is defined therein as:

> *"The authority exercised by that department of government which is charged with declaration of what law is and its construction...The authority vested in courts and judges, as distinguished from the executive and legislative power...[ie]...power to decide and pronounce a judgement between persons and parties who bring a case before court for decision...Power that adjudicates upon and protects the rights and interests of persons or property, and to that end declares, construes and applies the law..."*

Ibid., at 986.

In defining "Administrative", "Administrative Agency[ies]" and "Administrative Officer[s]", *Black's Law Dictionary* distinguishes these succinctly from judicial functions, as executive functions due to their executive or ministerial nature. **Ibid. at 66, 67.**

Thus, in context, administrative procedures, such as the suspension of driving privileges, are functions of the executive branch of government, not of the Judiciary. This is buttressed by the fact that Article V, Section 6, of the *Hawaii State Constitution*, clearly places

Administrative agencies within the realm of the Executive. Although, new law may be created by the legislature, by both State and Federal standards, the legislature in so doing, may not subrogate the constitutional rights of its citizenry. **Fujioka v. Kam, 55 Haw. 7, 514 P.2d. 568 (1973).** The case at hand represents the violation of such constitutional rights. By placing the Administrative Driver License Revocation Office with the Judiciary, the State legislature has substantively undermined the constitutional rights of Plaintiffs. Through the auspices of *Section 286 et seq., H.R.S.,* the Judiciary is charged with prosecuting an action and then adjudicating any disputes arising therefrom. Moreover, the Judiciary must also neutrally adjudicate criminal proceedings (*Section 291-4, H.R.S.*), arising out of the same incident, where

Plaintiffs are defendants, and the State's interests are represented by a state's prosecutor. This situation represents an ongoing manifest violation of Plaintiffs' constitutional rights to Due Process as already argued beforehand.

Of additional importance, Hawaii State law disallows the conferral of power, by the legislature, that has already been delegated, thus legislative power to make laws cannot be delegated to another body. **Campbell v. Stainback, 38 Haw. 310 (1949); McCandless v. Campbell, 20 Haw. 411 (1911); Territory ex rel. Oahu County v. Whitney, 17 Haw. 174, 7 Ann.Cas. 737 (1905).** Following this rationale, neither should executive functions be bestowed upon the Judiciary.

It has been well established that the delegation of governmental powers in the *Hawaii State Constitution* parallels those of the federal constitution. **Trustees of**

the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446, 484 U.S. 898, 98 L.Ed.2d. 192, 108 S.Ct. 234 (1987). In determining the scope of judicial power, the Court also determined that the parameters established by the U.S. Supreme Court would apply in Hawaii; that the resolution of public disputes by the Judiciary must be limited to questions which could be resolved and which are presented in an adversary context. **Ibid.**

A definitive perspective on the delegation of state's powers is offered in the following passage:

> *"It is a well-settled general principle that nonjudicial functions cannot be exercised by, or be imposed upon, courts, and statutes which attempt to make a court play a part in the administrative process by conferring it administrative or legislative, as distinguished from judicial, functions contravene the principle of separation of powers among the different branches of our government."*

(emphasis added) **Section 579, 2 Am., Jur.2d. at 578.**

Interestingly, the only stage in the

administrative driver's license revocation proceeding which calls for advocacy of the state's interests by a non-judicial officer is this appeal; this Court has called upon the executive branch to brief, and if necessary, argue the merits of the state's position hereon. (Notice of Entering Case On Calendar, February 27, 1992).

With all due respect, Appellants must suggest that this begs the question: If there is no impropriety with regards to the manner in which an appeal for judicial review is tried before the District Court, why has his Court not chosen to adjudicate this matter without any state's presence save its own?

(ii) The licensee is unable to effectively address the issues to be raised at the administrative hearing despite the fact that the hearing officer is empowered to adjudicate controversies of fact

(a) The pre-deprivation hearing shifts the burden of proof to the licensee.

Under the construction of Hawaii's administrative revocation statute, Section 286 et seq., *H.R.S.*, an administrative hearing is merely an appeal from a unilaterally developed decision of a licensee's guilt. A driver who is arrested for DUI is issued a notice of license revocation and a thirty (30) day temporary driving permit; thus, it is the arresting officer who, on behalf of the Administrative Driver License Revocation Office of the Judiciary, in effect initially revokes a driver's license.

Subsequent to the issuance of the aforesaid notice of revocation, the director of the Administrative Driver License Revocation Office of the Judiciary is furnished with a copy of the arrest report, the sworn statements of the

arresting officer, the intoxilyzer machine supervisor and the machine's operator, the intoxilyzer test results, a copy of the notice of revocation issued to the arrestee, any driver's license which was taken into possession by the arresting officer and a list of any prior enforcement contacts. Section 286-257, *H.R.S.*.

In making his decision to rescind or uphold a licensee's revocation, the director is bound to consider all of the aforementioned as well as any written statement which may have been provided by the arrestee; such statement to be in the hands of the director no more than three (3) days from the time of the arrest and issuance of the notice of revocation.

At the time a licensee is allowed to make the aforementioned written defense, he is not provided access to any of the evidence or testimony arrayed against him.

Within eight (8) days, the director is to mail to the licensee a decision, reversing or sustaining the revocation; his decision based on whether there existed reasonable suspicion to stop the motor vehicle, probable cause to believe the licensee had been operating the vehicle while under the influence of intoxicating liquor and, the evidence proved by a preponderance that the arrestee operated the vehicle while under the influence of intoxicating liquor or had a blood alcohol concentration of .10 per cent or more or that the driver had refused to submit a breath or blood sample. Section 286-258, *H.R.S.*.

In the event the director finds against the driver, the driver may file for an administrative hearing to review the director's determination of guilt; said hearing conducted before a hearing officer who has had prior access to all of

the evidence considered by the director, his employer.

This hearing is not an adjudication of the issues before a neutral and detached magistrate. In fact, the licensee, at the hearing, is faced with the uphill battle of overcoming an existent determination of guilt.

The administrative hearing presents the first opportunity for an accused to address the evidence against him, despite the fact that he has already been found guilty on the basis of that evidence.

This, coupled with the fact that the hearing officer is not a neutral magistrate, but is instead placed in the untenable position of prosecuting and adjudicating a case subsequent to a negative determination by his supervisor, onerously shifts the burden of proof to the licensee.

The aforedescribed situation is

exacerbated by the fact that Judicial Review of a negative determination by the hearing officer is conducted under much the same circumstances, including pre-review access to an accused's prior alcohol enforcement contacts, and by the same branch of government, the charging party.

This situation flies in the face of the American principles of Due Process and the common law rule that the moving party has the burden of proof. **McCormick, Evidence, Section 357 (3rd Ed. 1984).** Because the Judiciary of the State of Hawaii is the moving party seeking to deprive a licensee of operating privileges, the burden of proof must be on the Judiciary and any attempt to shift that burden is a fundamental deviation from the fundamental principles of Due Process. **2 Am.,Jur 2d, Section 391.**

It defies logic to assume that the

burden of proof will remain with the state when the adjudicator of controversy of fact and questions of law is the moving party rather than a neutral party. Hence, the requirement for a "neutral" adjudicator, not only for the purpose of judicial proceedings, but also in administrative proceedings. Sussel v. City and County of Honolulu, supra.; Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

The doctrine of prerequisite neutrality, in order to preserve the federally mandated right to Due Process, which has been absent in the instant cases, is well established and has been iterated by a number of courts. Id.; State v. Brown, supra.' Offutt v. United States, supra.; Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

It is clear, in light of the aforegoing, that the manifest deficiencies in the constructs of Section 286 et seq., *H.R.S.*, violated Appellants' constitutional rights to Due Process and that said deficiencies will extend to all licensees' subject to the administrative revocation proceedings established by that statute.